# REPORT

ON

# THE LAW OF STANDING

ONTARIO LAW REFORM COMMISSION

## EXECUTIVE SUMMARY

Ministry of the
Attorney
General

1989

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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## EXECUTIVE SUMMARY

In the *Report on the Law of Standing*, the Ontario Law Reform Commission proposes a new approach to standing to sue in Ontario, which will expand the basis on which individuals may have access to the courts to raise important issues of public interest.

The Commission is of the view that fundamental change is required because the existing law of standing is seriously deficient. Of particular concern is the public nuisance standing rule. Under that rule, in cases of public nuisance or where the public interest or a public right is involved, only the Attorney General may bring proceedings in the courts, and individuals have standing to do so only with the consent of the Attorney General unless they can show that their own personal, pecuniary, or proprietary interest has been affected in a way different from the rest of the general public.

The Commission criticizes the public nuisance rule for two reasons. First, where proceedings are brought against the government, the Attorney General is both the person deciding whether the proceedings may be brought and the person charged with defending the government. Second, requiring an individual to show a special personal interest as a condition of standing places access to our courts on an unduly narrow basis, preventing the law from responding to conduct having a generalized, diffuse effect, because no one may be able to demonstrate a unique interest.

The effect of the public nuisance rule is most significantly felt in the area of environmental law, where it may frustrate efforts by individuals to prevent or halt pollution.

The Supreme Court of Canada has departed from the public nuisance standing rule in constitutional and administrative law. In these contexts, the Attorney General has no control over standing, and individuals need not show that their own personal, pecuniary, or proprietary interest has been affected in a way different from the rest of the general public. To challenge legislation, an individual need show that there is a serious issue as to its invalidity, that he has a genuine interest as a citizen in its invalidity, and that there is no other reasonable and effective manner in which the issue may be brought before a court.

While the Commission lauds the general direction taken by the Court, it is concerned that the precise nature of the test for standing and the extent to which it is applicable are both uncertain.

The Commission recommends that the present provincial law of standing be abolished, to be replaced by a new *Access to Courts Act*. The main purpose of this Act will be to increase access to the courts by granting standing to many persons who now do not have that right—that is, individuals who do not have a personal, pecuniary, or proprietary interest that has been specially or uniquely affected. The Commission's new approach to the right of individuals to sue in Ontario courts reflects the fact that individuals may be affected by conduct in a way that is not tied to a traditional legal interest.

Under the new Act, a single, more liberal standing rule will apply to all types of civil proceeding, including proceedings brought under the *Judicial Review Procedure Act*. The basic rule will be that every person should be entitled to commence and maintain a legal proceeding unless a person challenging such a right satisfies the court that the factors against proceeding outweigh the factors in favour of proceeding.

As part of this fundamental reform, the public nuisance standing rule will be abolished. The Commission specifically recommends that no person be denied the right to sue simply because that person has no personal, proprietary or pecuniary interest in the proceeding, or has suffered or may suffer injury or harm of the same kind or to the same degree as other persons. The Attorney General will no longer have a right to block access to the courts. However, the existing right of the Attorney General to bring a proceeding will not be limited or affected in any way by the Commission's proposals.

Where a person's right to sue is challenged, the court will be required to consider certain factors to determine the issue. The following factors are proposed:

(a) regardless of whether or not the interest of the plaintiff is personal, proprietary or pecuniary,

  (i) whether another proceeding has been instituted against the same defendant in which the issues include those present in the proceeding that is opposed, if the interests of the plaintiff can be met by intervening in the other proceeding and it is reasonable to expect the plaintiff to do so;

  (ii) whether to proceed would be unfair to persons affected, but the fact that the outcome may affect a person whose interest is personal, proprietary or pecuniary shall not necessarily be considered unfair; and

  (iii) whether or not another reasonable and effective method exists to raise the issues that are sought to be litigated; and

(b) where the interest of the plaintiff is not personal, proprietary or pecuniary,

  (i) whether the issues raised in the proceeding are trivial, and

(ii) the number of persons affected in any way, whether personally or otherwise;

and the court may consider any other factor that the court considers just.

The Commission recommends that the standing provisions in the proposed *Access to Courts Act* should be in addition to, and should not detract from, any right to bring a proceeding that is conferred by any other Act. The *Access to Courts Act* will co-exist with any other legislation dealing with standing, and a person who does not meet the requirements for standing to sue under other Ontario legislation may seek standing under the new Act.

The *Report on the Law of Standing* also considers intervention, that is, the right of a person to participate in proceedings to which he or she is not an original party. The Commission is confident that an innovative and flexible use of the present intervention rule, Rule 13 of the Rules of Civil Procedure, will be encouraged by the proposed liberalized standing regime. It therefore recommends that the Rule should not be changed, but should be left to evolve on a case-by-case basis. However, if the Rule does not develop in the manner anticipated, the Commission recommends that it be reconsidered.

In the report, much attention is given to the important issue of costs. The Commission concludes that, without fundamental change to the present law of costs, its proposals for reform of the law of standing will be ineffective. A plaintiff without any personal, proprietary, or pecuniary interest in the outcome of a proceeding, or an interest that does not justify the proceeding economically, will not be likely to bring a proceeding in the face of the risk of paying costs to his or her adversary if unsuccessful.

Accordingly, the Commission recommends that, in certain circumstances, it should not be possible for the court to order plaintiffs to pay costs to defendants, except where they have engaged in vexatious, frivolous or abusive conduct. Such a rule will apply where all the following conditions have been met: where the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; where the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has such an interest, it clearly does not justify the proceeding economically; where the issues have not been previously determined by a court in a proceeding against the same defendant; and where the defendant has a clearly superior capacity to bear the costs of the proceeding.

The Commission recognizes that uncertainty over whether a person will enjoy a costs immunity may itself discourage that person from suing where he or she has little or no financial interest in the outcome of the proceeding. To meet this difficulty, the Commission further recommends that, at any time in a proceeding, a person may ask the court to make a decision whether he or she will have an immunity from being ordered to pay costs.

As to the costs payable by a client to his or her own lawyer, the Commission recommends that a person with a costs immunity and his or her lawyer should be

able to enter into a form of contingency fee agreement, providing for payment to the lawyer only in the event of success in the proceeding. Recognizing the dangers of a conflict of interest for the lawyer under any contingency arrangement, the Commission further recommends that an agreement may not specify the amount payable in the event of success as a gross sum, percentage, or commission. It may, however, include an amount payable in respect of fees that is reasonable compensation for the risk of non-payment assumed by the lawyer.

The issue of costs is also considered in connection with intervention. Consistent with its general costs proposals, the Commission recommends that intervenors should enjoy an immunity from costs in certain circumstances, save in the case of vexatious, frivolous or abusive conduct. An intervenor will be immune from costs where all the following conditions have been met: where the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved; where the intervenor has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the intervention economically; and where the intervenor has contributed significantly to the resolution of the issues. While an intervenor generally may recover costs from another party, an intervenor will not be able to recover costs from a plaintiff who has a costs immunity.

## SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

### THE LAW OF STANDING: PROPOSALS FOR REFORM (CHAPTER 4)

1. (1) Subject to the right to commence and maintain a proceeding that is conferred by or under any legislation other than the Act proposed by the Commission in this report (see Recommendation 6), the present provincial law of standing should be abolished, to be superseded by a new *Access to Courts Act*.

   (2) The new *Access to Courts Act* should contain a section expressly articulating the principle that the Act is to be read expansively and liberally, so as to increase access to the courts by granting the right to commence and maintain a proceeding to many persons who now would not have that right.

   (3) The Act should establish a single, more liberal rule respecting the commencement and maintenance of proceedings. In particular, every person should be entitled to commence and maintain a proceeding unless a party challenging such a right satisfies the court that there exist factors against proceeding that outweigh the factors in favour of proceeding. (See, also, Recommendation 4.)

   (4) The proposed rule respecting the commencement and maintenance of proceedings should be applicable to all types of civil proceeding, including proceedings under the *Judicial Review Procedure Act*.

2. The proposed *Access to Courts Act* should provide that no proceeding shall be dismissed and no pleading struck out only on the ground that the person bringing the proceeding

   (a) has no personal, proprietary or pecuniary interest in the proceeding; or

   (b) has suffered or may suffer injury or harm of the same kind or to the same degree as other persons.

3. While the new legislation would, in its effect, preclude the Attorney General from exercising his or her existing right to block access to the courts and, as a necessary concomitant, would also abolish relator actions, nothing in such legislation should limit or affect in any way the right of the Attorney General to commence and maintain a proceeding to the extent permissible by law.

4. With respect to the commencement and maintenance of proceedings, in determining whether the factors against proceeding outweigh the factors in favour of proceeding (see Recommendation 1(3)), the court should be required to consider,

   (a) regardless of whether or not the interest of the plaintiff is personal, proprietary or pecuniary,

      (i) whether another proceeding has been instituted against the same defendant in which the issues include those present in the proceeding that is opposed, if the interests of the plaintiff can be met by intervening in the other proceeding and it is reasonable to expect the plaintiff to do so;

      (ii) whether to proceed would be unfair to persons affected, but the fact that the outcome may affect a person whose interest is personal, proprietary or pecuniary shall not necessarily be considered unfair; and

      (iii) whether or not another reasonable and effective method exists to raise the issues that are sought to be litigated; and

   (b) where the interest of the plaintiff is not personal, proprietary or pecuniary,

      (i) whether the issues raised in the proceeding are trivial, and

      (ii) the number of persons affected in any way, whether personally or otherwise;

   and the court may consider any other factor that the court considers just.

5. (1) Subject to Recommendations 5(2) and (3), the present law respecting the entitlement of a defendant to bring a motion to challenge the right of a person to commence and maintain a proceeding, and the discretion of the court to defer the issue for consideration until after the hearing of the merits, should be retained.

   (2) On a motion challenging the right of a person to commence and maintain a proceeding, the court should be required to defer the issue for consideration until after the hearing of the merits of the case, unless the court is satisfied that, in the particular circumstances of the case, it is desirable that the issue should be determined at an earlier time.

   (3) The decision of the court to adjourn the issue for consideration until after the hearing of the merits should not be appealable.

6. The provisions for the commencement and maintenance of a proceeding in the proposed *Access to Courts Act* should be in addition to, and not in derogation of, any right to commence and maintain a proceeding that is conferred by or under any other Act.

## INTERVENTION (CHAPTER 5)

7. In the hope and expectation that the interpretation of Rule 13 of the Rules of Civil Procedure will be influenced by the principles and policies governing the Commission's liberalized regime respecting the commencement and maintenance of proceedings, Rule 13 should be retained and be given an opportunity to evolve over time on a case-by-case basis. However, in the event that Rule 13 should not develop in this direction, it should be reconsidered with a view to reform.

8. Nothing in the Commission's proposals should limit or affect in any way the right of the Attorney General to intervene in a civil proceeding initiated by another person, to the extent permissible by law.

9. No person should be denied leave to intervene in a proceeding solely because the Attorney General is already a party or intervenor in the proceeding.

10. A person who commences a proceeding to enjoin conduct that is an offence under a statute of the Legislative Assembly of Ontario or of the Parliament of Canada should be required to give notice of the commencement to the Minister who is responsible for the administration of the statute, except that in the case of the *Criminal Code* (Canada) the notice should be to the Attorney General for Ontario. In addition, further notice should be given to such other Minister as the court directs.

## COSTS (CHAPTER 6)

11. (1) No costs should be awarded against a person who commences a proceeding where

    (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;

    (b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has such an interest, it clearly does not justify the proceeding economically;

    (c) the issues have not been previously determined by a court in a proceeding against the same defendant; and

    (d) the defendant has a clearly superior capacity to bear the costs of the proceeding,

    unless the person has engaged in vexatious, frivolous or abusive conduct.

    (2) A motion for a declaratory order determining whether a person has a costs immunity may be brought at any time in a proceeding.

12. The costs immunity provided in Recommendation 11(1) does not apply to motions.

13. An order for security for costs should not be made against a person who has a costs immunity.

14. Where a person who has a costs immunity is successful and the judgment is not more favourable than the terms of an offer to settle made and served by an opposing party, that person is entitled to party and party costs to the date that the offer to settle was served, but the court may award him or her party and party costs after that date.

15. (1) A person who has a costs immunity pursuant to Recommendation 11(1) and his or her lawyer should be entitled to enter into an agreement in writing that stipulates that the latter will be entitled to receive payment for fees, costs, disbursements or charges only in the event of success in the proceeding.

    (2) An agreement made pursuant to Recommendation 15(1) may not specify the amount payable in the event of success as a gross sum, percentage, or commission.

    (3) However, subject to the prohibition in Recommendation 15(2), an agreement made pursuant to Recommendation 15(1) may include an amount payable in respect of fees that is reasonable compensation for the risk of non-payment assumed by the lawyer.

16. If a person is successful in resisting a challenge to his or her right to commence and maintain a proceeding, costs in respect of that challenge should be awarded on a solicitor and client scale, payable forthwith, unless the court is satisfied that the challenge, although unsuccessful, was nevertheless reasonable.

17. Costs should not be awarded against an intervenor in the following circumstances:

    (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;

    (b) the intervenor has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the intervention economically; and

    (c) the intervenor has contributed significantly to the resolution of the issues,

    except where the intervenor has engaged in vexatious, frivolous or abusive conduct.

18. An intervenor should not be entitled to recover costs from a person who has a costs immunity under Recommendation 11(1).

# RAPPORT

**SUR**

# LES RÈGLES RELATIVES À LA QUALITÉ POUR AGIR

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**Commission de réforme du droit de l'Ontario**

## SOMMAIRE

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**Ministère du Procureur Général**

**1989**

La Commission de réforme du droit de l'Ontario a été constituée en vertu de la *Loi sur la Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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## SOMMAIRE

Dans son rapport intitulé *Report on the Law of Standing*, la Commission de réforme du droit de l'Ontario offre une nouvelle perspective en ce qui concerne la qualité pour agir en Ontario. Selon cette nouvelle perspective, les principes fondamentaux d'accès aux tribunaux seraient élargis pour permettre aux justiciables de porter en justice toute question importante touchant l'intérêt public.

La Commission estime que de profonds changements s'imposent pour pallier les lacunes des règles actuelles relatives à la qualité pour agir. L'une d'entre elles prévoit que dans les instances visant une nuisance publique ou mettant en jeu l'intérêt public, seul le Procureur général peut intenter des poursuites en justice, tandis que les justiciables n'ont qualité pour agir qu'avec son consentement, à moins qu'ils ne démontrent que leurs intérêts personnels, pécuniaires ou propriétaux sont touchés d'une façon plus particulière que l'ensemble du public.

La Commission s'en prend à la règle de la nuisance publique pour deux raisons. Tout d'abord, lorsque des poursuites sont intentées contre le gouvernement, le Procureur général représente à la fois la personne à qui appartient la décision d'introduire une instance et celle qui a pour rôle de défendre le gouvernement. Deuxièmement, le fait d'obliger un justiciable à faire la preuve de son intérêt personnel avant d'avoir qualité pour agir constitue une entrave injustifiée à l'accès à la justice, avec pour conséquence d'empêcher le traitement en justice des comportements ayant des conséquences généralisées et diffuses, lorsque personne ne peut faire la preuve d'un intérêt particulier.

La règle de la nuisance publique peut aller, surtout au niveau du droit de l'environnement, jusqu'à anéantir toute tentative individuelle de faire corriger les problèmes de pollution.

La Cour suprême du Canada a écarté la règle de la nuisance publique dans les causes de droit constitutionnel et administratif. Le Procureur général ne peut, dans ce genre de causes, régir la qualité pour agir et les justiciables n'ont pas à démontrer que leur intérêt personnel, pécuniaire ou propriétal est plus particulièrement touché que celui de l'ensemble du public. Le justiciable qui veut contester une loi doit établir qu'il existe un contentieux important à propos de sa validité, que cette invalidité le touche véritablement en tant que citoyen et qu'il n'existe pas d'autre moyen raisonnable et efficace de porter l'affaire en justice.

La Commission se réjouit de l'approche générale adoptée par la Cour, mais se préoccupe de l'absence d'une définition suffisamment précise et de l'application incertaine du critère relatif à la qualité pour agir.

La Commission recommande que le droit relatif à la qualité pour agir actuellement en vigueur dans la province soit aboli et remplacé par une loi qui s'intitulerait *Loi sur l'accès aux tribunaux*. Cette loi viserait principalement à faciliter l'accès aux tribunaux en accordant la qualité pour agir à nombre de personnes qui dans les circonstances actuelles ne jouissent pas de ce droit, en l'occurrence à ceux des justiciables qui ne possèdent pas un intérêt personnel, pécuniaire ou propriétal ayant été affecté d'une façon toute particulière. Cette nouvelle perspective de la Commission en ce qui concerne le droit des justiciables d'introduire une instance devant les tribunaux ontariens tient compte de ce que de nombreux justiciables sont exposés à des comportements ne touchant pas des intérêts juridiques au sens traditionnel du terme.

Cette nouvelle loi aurait pour effet d'instaurer une règle unique et plus libérale en ce qui concerne la qualité pour agir en matière civile, y compris les instances découlant de la *Loi sur la procédure de révision judiciaire*. Cette règle accorderait fondamentalement à chacun le droit d'introduire et de poursuivre une instance, à moins qu'une autre personne ne puisse convaincre le tribunal que les facteurs militant contre l'introduction de l'instance ont préséance sur les facteurs tendant à la justifier.

Ce moyen de réforme fondamental s'accompagnerait de l'abolition de la règle de la nuisance publique. La Commission recommande plus particulièrement de ne plus refuser à quelqu'un le droit d'introduire une instance du seul fait qu'il ne possède pas d'intérêt personnel, pécuniaire ou propriétal dans l'instance, ou qu'il a subi ou pourrait subir un préjudice ou un tort comparable à ce que connaissent d'autres personnes. Le Procureur général n'aurait plus le droit de refuser à quelqu'un le droit de recourir aux tribunaux. Cependant, le droit actuel du Procureur général d'introduire une instance ne serait nullement limité ou affecté par les recommandations de la Commission.

En cas de contestation du droit d'une personne d'introduire une instance, le tribunal devrait être tenu d'examiner la question à la lumière des critères qu'il estime justes et plus particulièrement des critères suivants :

a) abstraction faite du caractère personnel, pécuniaire ou propriétal de l'intérêt du demandeur,

   (i) déterminer si une autre instance a été introduite contre le même défendeur pour des motifs analogues, s'il est possible pour le demandeur de faire valoir ses intérêts par voie d'intervention dans cette autre instance et si l'on peut raisonnablement attendre du demandeur qu'il le fasse;

(ii) déterminer si l'instance serait injuste à l'égard des personnes visées, quoique les conséquences de l'issue de l'instance sur l'intérêt personnel, pécuniaire ou propriétal de la personne visée ne pourraient pas entrer en ligne de compte;

(iii) déterminer s'il existe d'autres moyens raisonnables et efficaces d'obtenir un règlement du litige faisant l'objet de l'instance;

b) lorsque l'intérêt du demandeur n'est ni personnel, pécuniaire ou propriétal,

(i) déterminer si l'objet de l'instance n'est pas sans importance;

(ii) déterminer le nombre de personnes touchées d'une façon quelconque, soit à titre individuel ou autre.

La Commission recommande que les dispositions de la *Loi sur l'accès aux tribunaux* proposée visant la qualité pour agir s'ajoutent, sans y déroger, au droit d'introduire une instance prévu par toute autre loi. La *Loi sur l'accès aux tribunaux* viendrait ainsi s'ajouter aux autres lois traitant de la qualité pour agir et une personne qui n'a pas qualité pour agir en vertu d'une autre loi de l'Ontario pourrait invoquer la nouvelle loi.

Le *Report on the Law of Standing* examine également la question de l'intervention, soit le droit d'une personne de participer à une instance à laquelle elle n'était pas partie à l'origine. La Commission a bon espoir que l'assouplissement proposé des règles relatives à la qualité pour agir se traduira à la longue par une interprétation tout aussi souple et innovatrice de la règle 13 des Règles de procédure civile actuelles relatives à l'intervention. Par conséquent, elle ne propose pas la modification de la règle 13, sachant que cette dernière sera appelée à évoluer d'elle-même au fil des causes. Cependant, si la règle n'évolue pas dans le sens escompté, la Commission recommande de la remettre en question.

Le rapport accorde une grande importance à la question des dépens. La Commission conclut que, à moins de modifier considérablement les règles juridiques actuelles relatives aux dépens, les réformes proposées quant à la qualité pour agir demeureraient lettre morte. Le demandeur qui ne possède aucun intérêt personnel, pécuniaire ou propriétal dans une instance, ni aucun autre intérêt pouvant la justifier au plan économique, risque de ne pas introduire d'instance par crainte d'être condamné à payer les dépens de son adversaire.

La Commission recommande donc que dans certaines instances, le tribunal ne puisse pas condamner le demandeur aux dépens, sauf lorsque

l'instance s'est révélée vexatoire, frivole ou déraisonnable de la part du demandeur. La règle proposée s'appliquerait plus particulièrement lorsque l'instance porte sur des questions débordant les intérêts immédiats des parties en cause, lorsque le demandeur ne possède aucun intérêt personnel, pécuniaire ou propriétal dans l'issue de la cause, ou, du moins, aucun intérêt de nature à justifier manifestement l'instance au plan économique, lorsque les questions en litige n'ont pas encore fait l'objet d'une décision judiciaire suite à l'introduction d'une autre instance contre le même défendeur et, finalement, lorsque le défendeur est manifestement mieux à même d'absorber les dépens.

La Commission reconnaît que la difficulté pour une personne de savoir si elle bénéficiera de l'exonération des dépens peut en soi la dissuader d'introduire une instance si elle ne possède pour ainsi dire pas d'intérêt économique dans l'issue de celle-ci. Afin de pallier cette difficulté, la Commission recommande en outre d'accorder à une personne le droit de demander au tribunal à un moment quelconque de l'instance si elle bénéficie de l'exonération des dépens.

En ce qui concerne les frais entre avocat et client, la Commission recommande que la personne jouissant de l'exonération des dépens et son avocat puisse conclure un accord de rémunération conditionnelle, selon lequel l'avocat aurait droit à ses honoraires à condition d'obtenir gain de cause pour son client. Conscient du conflit d'intérêt possible en ce qui concerne l'avocat qui est partie à un accord de rémunération conditionnelle, la Commission recommande en outre que pareil accord ne puisse prévoir le versement à l'avocat dont le client obtient gain de cause, d'un montant forfaitaire, d'un pourcentage ou d'une commission. L'accord pourrait, toutefois, prévoir le versement d'honoraires raisonnables, en guise de compensation du risque de non-paiement pris par l'avocat.

La question des dépens encourus dans le cadre d'une intervention a également été abordée par la Commission. Comme conséquence logique de ses recommandations visant la question des dépens en général, la Commission recommande que les intervenants jouissent également de l'exonération des dépens dans certaines circonstances, à moins que leur conduite n'ait été frivole, vexatoire ou déraisonnable. Un intervenant bénéficierait de l'exonération des dépens lorsque la question en litige déborde les intérêts immédiats des parties en cause, lorsque l'intervenant ne possède aucun intérêt personnel, pécuniaire ou propriétal dans l'instance ou, dans le cas contraire, lorsque l'intervention ne lui apporte rien au plan économique et, finalement, lorsque l'intervenant a contribué substantiellement au règlement des questions en litige. Un intervenant peut se faire payer les dépens par une autre partie, mais non par un demandeur qui jouit de l'exonération des dépens.

# RÉSUMÉ DES RECOMMANDATIONS

La Commission formule les recommandations suivantes :

## RÈGLES RELATIVES À LA QUALITÉ POUR AGIR : PROPOSITIONS DE RÉFORME (CHAPITRE 4)

1. (1) Sous réserve du droit d'introduire et de poursuivre une instance en vertu de toute disposition législative autre que celles prévues par la Loi proposée par la Commission dans son rapport (Voir la Recommandation 6), les règles de droit régissant la qualité pour agir actuellement en vigueur en Ontario, devraient être abrogées et remplacées par une nouvelle loi intitulée *Loi sur l'accès aux tribunaux*.

   (2) La nouvelle *Loi sur l'accès aux tribunaux* devrait prévoir expressément que la Loi devrait faire l'objet d'une interprétation généreuse et libérale afin de faciliter l'accès aux tribunaux en accordant le droit d'introduire et de poursuivre une instance à nombre de personnes qui ne jouissent pas actuellement de ce droit.

   (3) La Loi devrait instaurer une règle unique et plus libérale en ce qui concerne l'introduction et la poursuite d'une instance. De façon plus précise, chacun devrait avoir le droit d'introduire et de poursuivre une instance, à moins que la partie qui conteste ce droit ne réussisse à convaincre le tribunal que les circonstances militant contre l'introduction de l'instance ont préséance sur les circonstances militant en faveur de celle-ci.

   (4) La règle proposée en ce qui concerne l'introduction et la poursuite d'une instance devrait s'appliquer à toutes les actions civiles, y compris les instances découlant de la *Loi sur la procédure de révision judiciaire*.

2. La *Loi sur l'accès aux tribunaux* proposée devrait prévoir qu'aucune instance ne peut être rejetée, ni aucun acte de procédure radié, pour l'un des motifs suivants:

   (a) la personne qui introduit l'instance ne possède aucun intérêt personnel, pécuniaire ou propriétal dans l'instance,

   (b) elle n'a pas subi, ni ne pourrait subir, un préjudice ou un tort différent ou plus grave que d'autres personnes.

3. Quoique les nouvelles dispositions auraient pour effet d'empêcher le Procureur général d'exercer son droit actuel de refuser l'accès aux tribunaux et, partant, les actions par une partie civile ("relator actions"), elles ne sauraient cependant limiter ou toucher d'une façon quelconque le droit du Procureur général d'introduire ou de poursuivre une action dans la mesure où les règles de droit actuelles le lui permettent.

4. En ce qui a trait à l'introduction et à la poursuite d'une instance, le tribunal devrait, pour décider si les facteurs militant contre l'instance ont préséance sur les facteurs militants en faveur de celle-ci, tenir compte des critères qu'il estime justes et plus particulièrement des critères suivants :

    (a) abstraction faite du caractère personnel, pécuniaire ou propriétal de l'intérêt du demandeur,

        (i) déterminer si une autre instance a été introduite contre le même défendeur pour des motifs analogues, s'il est possible pour le demandeur de faire valoir ses intérêts par voie d'intervention dans cette autre instance et si l'on peut raisonnablement attendre du demandeur qu'il le fasse;

        (ii) déterminer si l'instance serait injuste à l'égard des personnes visées, quoique les conséquences de l'issue de l'instance sur l'intérêt personnel, pécuniaire ou propriétal de la personne visée ne pourraient pas entrer en ligne de compte;

        (iii) déterminer s'il existe d'autres moyens raisonnables et efficaces d'obtenir un règlement du litige faisant l'objet de l'instance;

    (b) lorsque l'intérêt du demandeur n'est ni personnel, pécuniaire ou propriétal,

        (i) déterminer si l'objet de l'instance n'est pas sans importance;

        (ii) déterminer le nombre de personnes touchées d'une façon quelconque, soit à titre individuel ou autre.

5. (1) Sous réserve des recommandations 5(2) et (3), il y aurait lieu de préserver les règles de droit régissant actuellement le droit du défendeur de présenter une motion d'opposition à l'introduction et à la poursuite d'une instance ainsi que de préserver le pouvoir discrétionnaire du tribunal de statuer sur la motion après audition du fond de la cause.

    (2) Le tribunal saisi d'une motion d'opposition à l'introduction et à la

poursuite d'une instance, devrait statuer sur la motion après audition du fond de la cause, à moins que le tribunal n'estime préférable, eu égard aux circonstances de l'espèce, de statuer plus tôt.

(3) La décision du tribunal de statuer sur la motion d'opposition après audition du fond de la cause devrait être sans appel.

6. Les dispositions dans la *Loi sur l'accès aux tribunaux* relatives à l'introduction et à la poursuite d'une instance devraient s'ajouter, sans y déroger, au droit prévu en ce sens par toute autre Loi ou sous le régime de celle-ci.

## INTERVENTION (CHAPITRE 5)

7. La Commission recommande de préserver la règle 13 des Règles de procédure civile et de la laisser évoluer au fil des causes, à supposer, bien entendu, qu'elle soit appliquée dans l'esprit libéral des politiques et des principes qui sous-tendent les recommandations de la Commission quant à l'introduction et à la poursuite d'une instance. Advenant le cas où cette règle évoluerait dans un sens différent, il y aurait lieu d'envisager une réforme de celle-ci.

8. Les recommandations de la Commission n'ont pas pour effet de limiter ou de toucher d'une façon quelconque le droit du Procureur général d'intervenir dans une instance civile introduite par une autre personne, dans toute la mesure permise par les règles de droit actuelles.

9. La permission d'intervenir ne devrait pas être refusée à une personne au seul motif que le Procureur général est déjà partie à l'instance ou intervenant dans celle-ci.

10. Quiconque introduit une instance visant à contraindre une autre personne à un comportement contraire à l'une des lois de l'Assemblée législative de l'Ontario ou du Parlement du Canada devrait être tenu d'en aviser le ministre responsable de l'application de cette loi. Dans le cas d'une infraction prévue au *Code criminel* cependant, l'avis devrait être donné au Procureur général de l'Ontario. Un avis devrait également être donné à tout autre ministre que le tribunal estime nécessaire d'aviser.

## DÉPENS (CHAPITRE 6)

11. (1) Une personne qui introduit une instance ne devrait pas être condamnée aux dépens lorsque les conditions suivantes sont réunies, à moins que l'instance n'ait été vexatoire, frivole ou déraisonnable de sa part :

(a) l'instance porte sur des questions importantes qui débordent les intérêts immédiats des parties en cause;

(b) la personne ne possède pas d'intérêt personnel, propriétal ou pécuniaire dans l'instance; dans le cas contraire, cet intérêt ne justifie pas l'instance au plan économique;

(c) les questions n'ont pas fait antérieurement l'objet d'une décision judiciaire lors d'une instance contre le même défendeur;

(d) le défendeur est mieux à même de les supporter.

(2) Une motion visant à obtenir une ordonnance déclaratoire afin de déterminer si une personne jouit de l'exonération des dépens peut être présentée à tout moment d'une instance.

12. L'exonération des dépens prévue par la Recommandation 11(1) ne s'applique pas aux motions.

13. Une motion visant à obtenir un cautionnement pour dépens ne devrait pas être présentée contre une personne qui bénéficie de l'exonération des dépens.

14. Lorsqu'une personne qui bénéficie de l'exonération des dépens obtient gain de cause et que le montant accordé par jugement ne dépasse pas celui qui était prévu dans l'offre de transaction signifiée par une partie adverse, cette personne a droit aux dépens partie-partie arrêtés à la date de signification de l'offre de transaction. Le tribunal peut toutefois lui accorder les dépens partie-partie calculés après cette date.

15. (1) La personne qui bénéficie de l'exonération des dépens prévue par la Recommandation 11(1) et son avocat devraient avoir le droit de passer un accord écrit stipulant que ce dernier a le droit de toucher un montant au titre de ses honoraires, débours et autres frais, à condition d'avoir obtenu gain de cause dans l'instance.

(2) L'accord visé à la Recommandation 15(1) ne peut pas prévoir le versement, si la cause est gagnée, d'un montant forfaitaire, d'un pourcentage ou d'une commission.

(3) Sous réserve de la recommandation 15(2), l'accord visé à la recommandation 15(1) peut prévoir le versement d'un montant raisonnable à titre d'honoraires, en guise de compensation du risque de non-paiement pris par l'avocat.

16. La personne qui fait triompher son droit d'introduire ou de poursuivre une instance à la suite d'une contestation de ce droit, devrait se voir accorder sans délai les dépens relatifs à la défense de son droit selon

l'échelle des frais entre avocat et client, à moins que le tribunal n'estime que la contestation, quoique infructueuse, était néanmoins raisonnable.

17. Un intervenant ne devrait pas être condamné aux dépens lorsque les conditions suivantes sont réunies, sauf si l'intervention était vexatoire, frivole ou déraisonnable de sa part :

    (a) l'instance portait sur des questions importantes qui débordaient l'intérêt immédiat des parties en cause;

    (b) l'intervenant ne possède aucun intérêt personnel, propriétal ou pécuniaire dans l'instance; dans le cas contraire, l'intervention ne se justifiait manifestement pas au plan économique;

    (c) l'intervenant a contribué considérablement à la résolution des questions en litige.

18. Un intervenant ne devrait pas se faire payer les dépens par une personne qui bénéficie de l'exonération des dépens prévue à la Recommandation 11(1).

# REPORT

ON

# THE LAW OF STANDING

ONTARIO LAW REFORM COMMISSION

Ministry of the
Attorney
General

1989

89-06240/

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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**Ontario**
**Law Reform**
**Commission**

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Attorney:

We have the honour to submit herewith our *Report on the Law of Standing*.

# CHAPTER 1

## GENERAL INTRODUCTION

"Access to justice" is one of the critical issues of the day. In large measure, the existence of a commitment to this principle, and the intensity of that commitment, reflect fundamental views on the nature of our democracy and on the individual's relationship to the state. Over the years, these views have given rise to dramatic changes in our legal system. For our purposes, one of the most significant changes has been the gradual movement away from an almost exclusive focus on the protection of proprietary and other "private" interests to a larger concern for the "public interest". These changes have compelled us to re-evaluate our notion of what access to the machinery of justice means.

The Commission's report addresses one important facet of this much broader topic, namely, the law of standing[1] in respect of all types of civil litigation in the courts of this province. As we shall see,[2] in deciding questions of standing, courts essentially determine whether a particular claim or interest, advocated by a particular plaintiff, should be recognized as deserving of advancement in the courts. The law of standing, therefore, raises a critically important threshold question concerning who is allowed to pursue what kinds of claim.

The manner in which the law of standing has dealt with this question has not remained static over the centuries. For our purposes, it bears emphasizing that relatively recent developments in Canada manifest a movement toward the recognition of a broader array of interests, particularly in two important spheres. Prior to the Supreme Court of Canada's seminal decision in *Thorson v. Attorney General of Canada*,[3] the law of standing reflected a rigid distinction between "private" nuisance and "public" nuisance. Under the former, an individual could sue exclusively in respect of an interference with the use or enjoyment of his land. In other cases—where the public nuisance rule applied—only the Attorney General could seek relief, either on his own motion or through a surrogate, known as a "relator". An individual, other than the Attorney General or a relator, was entitled to bring a private action for a public nuisance only if

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[1] See *infra*, this chapter concerning the concepts of standing, cause of action, justiciability, and capacity to sue.

[2] See *infra*, ch. 4, sec. 3(b)(i).

[3] [1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1.

she had suffered some "special" or unique harm. Over time, the influence of this public nuisance rule was extended beyond nuisance as such to other contexts in which a "public right" or a "public interest" was involved.

In *Thorson*, and the three subsequent cases that refined it, the Supreme Court of Canada dramatically altered the legal landscape by effectively abolishing the public nuisance rule in constitutional challenges[4] and in certain, as yet unsettled, types of administrative law litigation.[5] In these major public law areas, the Attorney General's gatekeeper role was rejected, and the court adopted a more flexible, discretionary approach to standing that obviated the need for plaintiffs to show special damage or some interference with a personal, pecuniary, or proprietary right. A new era had dawned for the individual's right to vindicate a "public" wrong.

The Commission welcomes the liberalization of the law in the field covered by the Supreme Court's quartet of cases, and recognizes the inapplicability of the public nuisance rule in the context of the prerogative remedies available under the *Judicial Review Procedure Act*.[6] However, notwithstanding this laudable state of affairs, we are of the view that the present law of standing, or at least a significant portion of it, remains fundamentally flawed and, therefore, in need of reform. Even the approach in the Supreme Court of Canada, while animated by a wish to increase access to the courts for private individuals in constitutional and administrative litigation, is lacking in structure and form.

But the gravamen of our criticism of existing law centres on the public nuisance rule. To the extent that this restrictive rule, and therefore the absolute, unreviewable control of the Attorney General, survives in respect of litigation involving so-called "public" rights or interests—to the extent that individuals are precluded from vindicating public rights unless they have some private or special interest in the litigation—the law is offensive and not compatible with our notions of who ought to have access to the judicial process in the face of widespread harm caused to all, or a significant segment, of the community.

In the past, the very existence of such diffuse harm to the community was seen as a reason why individual persons should be denied the opportunity to seek redress for it, and why the Attorney General was characterized as the sole and proper guardian of the public interest. However, the Commission believes that this perspective is out-dated. It ignores the fact that there is a much greater probability today that many people will be affected prejudicially by the conduct of the government and other large entities. This perspective reflects a simpler, now rather distant world in which the need to seek redress for "public" wrongs was, or at least was perceived to be, much less acute.

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4 *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, and *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588.

5 *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321.

6 R.S.O. 1980, c. 224. The public nuisance rule may be inapplicable because standing is governed by a statutory provision: see, for example, *Municipal Act*, R.S.O. 1980, c. 302, ss. 139 and 327, and *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 87(2).

The contemporary world is one in which adherence to a strict separation of the "public interest" and the "private interest" of individual members of society can no longer be justified. As one commentator has argued, "new values have developed which people feel are worthy of protection but which cannot be accommodated by the traditional restrictive standing criteria. Broader social, economic, religious and non-economic values outside established property criteria are justly prized and protection sought against their infringement".[7] Accordingly, we can now say that, as a matter of principle, it is precisely because the wider community itself is prejudicially affected by some large-scale wrongdoing that individual persons—those who, after all, *are* the community—should be entitled to seek relief in our courts of law.

This report, then, will recommend the liberalization of the standing rules, as well as substantial alteration of the law of costs, so that certain persons with interests hitherto not represented in court can have such interests recognized and protected in that forum, without being deterred by both the law of standing and the existing costs regime. In recommending a liberalized standing regime, however, we wish to make one further point. Our endorsement of greater access to justice should not be seen as an encouragement of increased judicialization of dispute resolution in Ontario. We are aware of the financial and other practical and philosophical considerations that now limit, and that ought to limit, the role of the courts. Rather, this report assumes that the interests that are the primary, although not exclusive, focus of our reform proposals—namely, interests that are neither personal, proprietary nor pecuniary—can, as a matter of general principle, be legitimately advanced in the courts, but have been denied access for reasons that are no longer persuasive. This is not to suggest that there can be no other vehicle for resolving disputes concerning these non-traditional legal interests. But the existence or creation and the operation of such other methods go beyond our terms of reference. We are concerned here exclusively with the judicial process and one's access to it.

Before turning to the present law, the Commission wishes to raise another matter, related to the scope of our study.

There are, of course, a number of grounds on which a court may determine that a particular claim, or a particular plaintiff, ought not to be able to proceed through the court system.[8] For example, a defendant may allege that the issue raised by the plaintiff is not justiciable, or that the plaintiff lacks the capacity to sue, or that his pleading "discloses no reasonable cause of action".[9] At various times, these concepts, and the notion of standing, have been distinguished from one another by both courts and commentators. However, the existence and theoretical bases of the distinctions—particularly between cause of action and

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[7] Craig, *Administrative Law* (1983), at 431.

[8] See, generally, Cromwell, *Locus Standi* [:] *A Commentary on the Law of Standing in Canada* (1986), at 1 *et seq*.

[9] Rules of Civil Procedure, O. Reg. 560/84, r. 21.01(1)(b).

standing—have not always been accepted; moreover, it is often very difficult to draw some of these distinctions as a matter of practice.

But notwithstanding the lack of universal agreement in the courts and in the literature, there does appear to be some acceptance by most commentators that the concepts described above do represent different aspects of the notion of entitlement to litigate. A recognition of the distinctive nature of standing is therefore essential to a principled discussion in this report of the law, its deficiencies, and its ultimate reform. Accordingly, while we shall not attempt to resolve the existing uncertainty concerning the precise nature and scope of these related concepts, very brief comment on them is warranted.

Turning first to justiciability, it has been said that this concept is distinct from standing in that justiciability relates broadly to the issue presented, whereas standing relates to the person seeking to present the issue. As one commentator has written:[10]

> [S]tanding goes to whether *this* applicant should be entitled to apply to the court for relief while justiciability goes to whether *any* applicant should be so entitled.

More specifically, a justiciable issue is said to be one that is *institutionally* appropriate for the courts to decide. Madame Justice Wilson affirmed this proposition in *Operation Dismantle v. The Queen*,[11] where she observed that, in the case of justiciability, the court's focus is self-regarding, its dominant concern being to define its proper role:[12]

> The real issue . . . is not the *ability* of judicial tribunals to make a decision on the questions presented, but the *appropriateness* of the use of judicial techniques for such purposes.

Therefore, it is arguable that the issue of justiciability appears logically to arise prior to the question of standing, because a court must look to its own competence before it considers a particular party's right to be heard.

Capacity and standing are similar concepts, in that both relate to the person seeking to obtain relief from the court. However, the central concern with respect to capacity is the legal competence of a particular party—that is, whether that party has the power to exercise legal rights—whereas, with respect to standing, capacity is presumed and the central concern is the plaintiff's right to sue. One commentator puts the distinction in this way:[13]

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[10] Cane, "The Function of Standing Rules in Administrative Law", [1980] Pub. L. 303, at 310 (emphasis in original).

[11] [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (subsequent references are to 18 D.L.R. (4th)).

[12] *Ibid.*, at 500 (emphasis in original).

[13] Cromwell, *supra*, note 8, at 3.

> The rules relating to whether infants, mental incompetents and unincorporated associations may sue all relate to the question of capacity . . . . The distinction between capacity and standing is that capacity generally depends on the personal characteristics of the party divorced from the merits of the proceeding or the nature of the question in issue in it . . . . Standing is concerned with the appropriateness of the court's dealing with the particular issues presented at the instance of the particular plaintiff.

The preceding characterization of standing as dealing with "particular issues" advanced by "the particular plaintiff" raises the difficult question concerning the ostensible distinction between cause of action and standing.[14] As we have said, a plaintiff may see his action dismissed if his pleading fails to disclose a cause of action. This proposition was clearly illustrated in *Operation Dismantle*. Both Dickson J. and Wilson J. were of the view that the issue of the reviewability of the government's discretion as it pertained to foreign relations and national defence was a justiciable issue; but neither believed that the statement of claim in question disclosed a cause of action.[15]

At one level, it may be said that standing refers broadly to the legal recognition of a person's entitlement to institute and continue proceedings. What is more difficult to define with any degree of certainty are the conditions that must be satisfied in order for that recognition to be granted by a court. Standing requirements, or rules, may vary, depending on the issue raised and the remedy sought. Nevertheless, in respect of standing there is a predominant concern with the sufficiency of the plaintiff's interest in the issues he is raising. Standing rules define what the nature and character of a plaintiff's interest must be in order for him to seek judicial relief.[16]

In our view, it is precisely this judicial determination whether a particular interest, advocated by a particular plaintiff, should be recognized as deserving of advancement in the courts that not only defines the notion of standing, but ultimately lies at the heart of the concept of cause of action as well. Both standing and cause of action basically deal, then, with persons *and* interests, with *who* should be permitted to sue as well as what *claims* should be recognized by the courts. They both require the courts to ask essentially the same questions.

We shall return to this analysis and its implications in chapter 4.[17] Suffice it to repeat here that the Commission seeks a more principled, and more liberal,

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[14] Indeed, insofar as the concept of justiciability is said to relate to the issues being litigated, a similarly difficult question arises in relation to standing. See *supra*, this ch., at text preceding note 10.

[15] *Supra*, note 11, at 520, *per* Wilson J.

[16] See Stein, "The Theoretical Bases of Locus Standi", in Stein (ed.), *Locus Standi* (1979) 3, at 3:

> Although the very existence of courts as an institutional mechanism for dispute settlement might suggest that anyone could require that an issue be considered by the appropriate court, rules have been enunciated by courts which confine the right to those persons possessing a certain interest in the issue.

[17] *Infra*, ch. 4, sec. 3(b)(i).

approach to the judicial determination with which cause of action and standing are concerned (although, for convenience, we shall use only the latter term throughout this report). It is for this reason that, while our proposals for reform will bear on all civil proceedings, our main focus is the area of so-called "public law" and the enforcement of "public rights". In terms of the law of standing, or the notion of cause of action, this is the area of primary controversy today. This is where the restrictiveness of the public nuisance rule is made manifest. This, then, is where reform must begin.

Our report consists of five substantive chapters and two appendices. Chapter 2 examines the present law of standing, chapter 3 describes its deficiencies and states the case for reform, and chapter 4 sets forth our recommendations for a new liberalized standing regime for Ontario. Chapter 5 then turns to intervention in civil proceedings. Chapter 6 deals with the critically important subject of costs, and in particular examines the effects of the Ontario "two way" costs rule, in the context of both standing and intervention. Appendix 1 contains our draft standing legislation, the *Access to Courts Act*, and Appendix 2 describes proposals for reform in other jurisdictions.

Before turning to a discussion of the present law, mention should be made of a further topic that is related to the question of standing in civil proceedings, but is not sufficiently germane to be addressed by the Commission in this report. The topic concerns whether a private individual should be entitled to seek damages on behalf of the public for a public nuisance or in respect of a violation of some "public right", and, if so, how those damages should be determined and administered. These issues would arise mainly in the context of environmental harm, where private individuals could be given the right to claim damages to remedy the effects of widespread pollution or other similar wrongdoing. The availability of damages would ensure that relief is given for injury to public interests where injunctive or declaratory relief has no application, such as where the harmful activity itself has ceased, but where the environment remains in need of repair or restoration.

The question whether private individuals ought to have such a right transcends the question whether they should be accorded standing in the first place. Accordingly, while the Commission is of the view that the issue of damages for public nuisance or harm should be the subject of study, it is not intended to consider the matter in this report.[18]

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[18] The issue of damages for public nuisance was considered, for example, in a report of the Law Reform Commission of British Columbia, entitled *Report on Civil Litigation in the Public Interest*, LRC 46 (1980). The report contemplated awarding damages "in an amount representing the cost of remedying the effect of the nuisance on the same basis as it would for a private nuisance" (Draft Bill, s. 52(1)). Damages would be payable to the Attorney General (*ibid.*), who would be under a duty to apply them "in whatever manner he considers appropriate to remedy the effect of the nuisance" (*ibid.*, s. 52(2)). Unfortunately, the report contained little discussion of these matters.

# CHAPTER 2

# THE PRESENT LAW

## 1. INTRODUCTION

In the introduction to this report, we stated our basic conclusion that the law of standing is in need of reform, and indicated the general direction that reform should take. To understand why we believe fundamental change is warranted, it is necessary to describe the existing law.

We shall present a general exposition of the important principles, rather than a detailed analysis of the law. The need for the latter, we suggest, has been relieved by the treatise on standing by Professor Cromwell, of the Faculty of Law, Dalhousie University, entitled "*Locus Standi*[:] *A Commentary on the Law of Standing in Canada*".[1] We have relied considerably upon this useful work, together with the rich Canadian periodical literature.[2]

We begin our discussion of the present law of standing with the caution that a "law of standing" does not, in fact, exist, in the sense of a single body of principles pertaining to a particular subject. The law of standing is fragmented, with different rules applicable in different contexts. In 1986, Professor Cromwell summarized the state of the law as follows:[3]

> The law of standing has been described as 'amorphous, inconsistent and complex' and as having developed as a 'by-product of other foundations of the law'. It may be doing the topic an unwarranted kindness to even speak of a law of standing.

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[1] Cromwell, *Locus Standi*[:] *A Commentary on the Law of Standing in Canada* (1986).

[2] See, for example, Mullan, "Standing After McNeil" (1976), 8 Ottawa L. Rev. 32; Roman, "Locus Standi: A Cure in Search of a Disease?", in Swaigen (ed.), *Environmental Rights in Canada* (1981)1; Mullan and Roman, "*Minister of Justice of Canada v. Borowski*": The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 Windsor Yearb. Access Justice 303; Chester, "Holy Joe and the Most Vexed Question — Standing to Sue and the Supreme Court of Canada" (1984), 5 Supreme Ct. L. Rev. 289; Bogart, "Standing and the Charter: Rights and Identity", in Sharpe (ed.), *Charter Litigation* (1986) 1 (hereinafter referred to as "Bogart I"); Cromwell, "From Trilogy to Quartet: *Minister of Finance of Canada v. Finlay*" (1987), 7 Windsor Yearb. Access Justice 103; Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988), 10 Supreme Ct. L. Rev. 377 (hereinafter referred to as "Bogart II"); and Evans, "Developments in Administrative Law: The 1986-87 Term" (1988), 10 Supreme Ct. L. Rev. 1, at 12-33.

[3] Cromwell, *supra*, note 1, at 11.

> The Canadian law on the subject consists of a number of rules developing in a number of different doctrinal and remedial contexts, frequently with very little attempt to reconcile outcomes with those obtained in parallel situations. To make matters worse, the courts have not probed the rationalia of standing rules very deeply. The result of all this is a large body of case law that is difficult to rationalize into a unified whole.

In Ontario, the law of standing may be considered to consist of five discrete, yet related, threads. First, until relatively recently, the law of standing was dominated by what we shall call the "public nuisance rule", the principles of which applied to actions seeking relief in relation to the "public interest" and "public rights". The second thread is the different approach to standing in constitutional challenges, first established in the 1970's by the Supreme Court of Canada, which was recently extended to certain challenges to the statutory authority for administrative action. The third thread consists of the principles governing standing to obtain the prerogative remedies, which are now available in the form of an application for judicial review under the *Judicial Review Procedure Act*.[4] In 1983, with the coming into force of the *Canadian Charter of Rights and Freedoms*,[5] further standing considerations were introduced to the law. This is the fourth strand. Finally, certain Ontario statutes include their own standing requirements.[6]

In this chapter, we shall focus primarily on the public nuisance rule and the approach taken by the Supreme Court of Canada to standing in constitutional, and certain administrative, challenges. We shall give considerably less attention to standing under the *Judicial Review Procedure Act* and under the Charter. Standing under individual statutes will not be addressed, since our concern about the limitations on access to justice centres on the principles developed by the courts. Finally, we shall consider an important procedural matter, namely, the timing of the court's decision on standing.

## 2. THE PUBLIC NUISANCE RULE

### (a) Introduction

In Canada, until relatively recently, the standing rule in public nuisance dominated the law of standing generally. Not only did the governing principles

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[4] R.S.O. 1980, c. 224.

[5] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[6] See, for example, *Business Corporations Act, 1982*, S.O. 1982, c. 4, ss. 244-52; *Municipal Act*, R.S.O. 1980, c. 302, ss. 139 and 327; *Planning Act*, R.S.O. 1980, c. 379, s. 42(5), and *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 87(2).

determine standing where an individual sued in public nuisance, but they applied to all proceedings seeking to vindicate the "public interest" or "public rights".[7] In 1974, with its landmark decision in *Thorson v. Attorney General of Canada*,[8] the Supreme Court of Canada decided that the public nuisance rule no longer should be dispositive of constitutional challenges to legislation, and that an entirely different, discretionary approach to standing should be followed in that context. In two subsequent decisions—*Nova Scotia Board of Censors v. McNeil*,[9] and *Minister of Justice of Canada v. Borowski*[10]—which, together with *Thorson*, formed the court's so-called standing "trilogy", it refined its treatment of standing; and, in 1986, in *Minister of Finance of Canada v. Finlay*[11] the court extended this approach beyond the realm of constitutional challenges to administrative challenges. We shall discuss the Supreme Court of Canada's standing quartet at a later juncture.[12] We mention it here to emphasize that it marks a relatively recent departure in Canada from the public nuisance rule, which had traditionally determined standing and, apart from legislation, continues to prevail in England.[13]

While, as we shall explain, the matter of definition is not simple, a "public nuisance" is an inconvenience or interference caused to the public generally, or part of the public, which does not affect the interests of individuals in land.

We shall first describe the public nuisance standing rule and the separate tort of private nuisance. The chapter will then digress briefly to explain the historical origins of the standing rule. Thereafter, we shall discuss the interpretation and application of the rule, and comment briefly about its pervasive impact.

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[7] In the case of the prerogative remedies, as we have stated, different principles were applicable: see *infra*, this ch., sec. 5.

[8] [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1 (subsequent references are to 43 D.L.R. (3d)).

[9] [1976] 2 S.C.R. 265, (1975), 55 D.L.R. (3d) 632 (subsequent references are to 55 D.L.R. (3d)).

[10] [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (subsequent references are to 130 D.L.R. (3d)).

[11] [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (subsequent references are to 33 D.L.R. (4th)).

[12] *Infra*, this ch., sec. 4.

[13] *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.). In 1977, the Rules of the Supreme Court 1965 were amended to introduce a new procedure called an "application for judicial review", which had its own standing requirement. An applicant must have "a sufficient interest in the matter to which the application relates" (O. 53, r. 3(7)). The test of "sufficient interest" has been given a relatively liberal interpretation: see *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617, [1981] 2 All E.R. 93 (subsequent references are to [1981] 2 All E.R.). For the position in Australia, see, generally, Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985), paras. 118-126, at 61-69.

### (b) The Rule

The standing of a private individual to bring proceedings to seek a remedy for public nuisance can be understood only in relation to the authority of the Attorney General to bring such proceedings. The public nuisance rule thus has two interrelated aspects, one stating the authority of the Attorney General to seek relief, the other defining when a private person has standing to do so.

The public nuisance rule can be shortly stated. Generally, only the Attorney General is entitled to sue in public nuisance, either on his own or through a private person to whom he has given his permission, who is known as a "relator".[14] This position reflects the traditional view of the Attorney General as guardian of the public interest on behalf of the Crown.[15] A private individual cannot seek a remedy for public nuisance without the consent of the Attorney General unless he can show that he has suffered a harm, or possesses an interest, that distinguishes him from the rest of the public.

Yet, it should be appreciated that this account is deceptively simple, for it disregards certain obvious and fundamental questions, such as what constitutes a "public nuisance" and what is the nature of the special interest required of an individual for her to have standing. We shall explore these important questions in our discussion of the interpretation and application of the rule.

As we indicated earlier, this rule has occupied a pre-eminent position in the law of standing, for "it has been applied in a variety of public law contexts where an issue of public right or interest has been raised".[16]

Where a private person who does not satisfy the requirements for individual standing requests the Attorney General to consent to him being a relator, the decision of the Attorney General is absolute and unreviewable by the courts. The inviolability of this principle was re-affirmed by the House of Lords in its famous decision in *Gouriet v. Union of Post Office Workers*,[17] where the applicant sought to bring an injunction to restrain the postal union from unlawfully refusing to handle mail sent to the Republic of South Africa.

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[14] For a history of the origins of the relator action, see Lord Diplock's speech in *Hoffman-La Roche v. Trade Secretary*, [1975] A.C. 295, [1974] 3 W.L.R. 104 (H.L.) (subsequent reference is to [1975] A.C.).

[15] Mercer, "The Citizen's Right to Sue in the Public Interest: The Roman *Actio Popularis* Revisited" (1983), 21 U.W. Ont. L. Rev. 89, at 92:

> In all Commonwealth jurisdictions, the exclusive authority to uphold and enforce public rights at law is vested in the Crown. As *parens patriae*, the Crown retains much of its ancient responsibility for maintaining the public good under the power of the royal prerogative. When the Attorney-General, as the chief law enforcement officer of the Crown, decides whether or not to allow a relator action to be brought, he is considered to be exercising a prerogative power.

[16] *Minister of Finance of Canada v. Finlay*, *supra*, note 11, at 329.

[17] *Supra*, note 13.

Where a private person is authorized to commence proceedings as a relator, he brings the proceedings in the name of the Attorney General. Once the consent of the Attorney General is received, the relator instructs counsel, proceeds to bring the action, and is personally liable for costs if the action is unsuccessful.[18] Nevertheless, the Attorney General retains a substantial measure of control over the conduct of the litigation; he has the right to approve the pleadings, and may apply for discontinuance of the action, even in the face of the relator's opposition. Moreover, before proceedings can be stayed, discontinued, or settled, the consent of the Attorney General must be secured.[19]

To appreciate fully the nature of the public nuisance standing rule, it is essential to contrast it with the standing principle applicable to private nuisance. In the case of private nuisance, where a person is seeking a remedy by means of his own action, that person has an unquestioned right to ask the court for relief; the Attorney General has no role to play, either in initiating proceedings or in controlling who may have access to the courts.

The contrasting treatment of standing, which differs fundamentally, depending on whether the alleged harm constitutes a public nuisance or a private nuisance, is largely explained by the history of the two actions. The genesis and early evolution of public nuisance and private nuisance continue to this day to have reverberations when we deal with questions of access to the courts. It is this matter that we shall now briefly consider.

### (c) Historical Background

Despite the similarity of the names given to them, in their origins private nuisance and public nuisance were completely unrelated. Private nuisance has always been an action concerned exclusively with "invasions of the interest in the use and enjoyment of land".[20] While, in its origins, private nuisance seems to have had a criminal dimension,[21] it has long been accepted that it is only a tort, and that the availability of the remedy is restricted to the person whose rights have been allegedly disturbed.

By contrast, public nuisance does not have its basis in relation to interference with land. As the action of private nuisance was developing, an entirely

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[18] In fact, it has been suggested that the origins of the relator action can be explained as a means of surmounting the practical problem that costs then could not be ordered for or against the Crown: see *Hoffman-La Roche v. Trade Secretary*, *supra*, note 14, at 363.

[19] With respect to relator actions, see, generally, Edwards, *The Attorney General, Politics and the Public Interest* (1984), at 130-45, and 286-95.

[20] Fleming, *The Law of Torts* (7th ed., 1987), at 381. Private nuisance has also been defined as "an interference of an indirect or consequential nature with the use of and enjoyment of land by the occupier thereof": see McLaren, "Nuisance in Canada", in Linden (ed.), *Studies in Canadian Tort Law* (1968) 320, at 324.

[21] See Linden, *Canadian Tort Law* (4th ed., 1988), at 494.

separate principle arose that an infringement of the rights of the Crown was a crime, which became known as nuisance.[22] Public or common nuisance began exclusively as a common law crime, and the class of offences comprehended by public nuisance has been said to include "a variegated assortment of petty offences whose common element was obstruction, inconvenience, or damage to the public in the exercise of rights common to all".[23]

There were thus two separate actions—a private tort for injury to land and a distinct concept of a crime for interference with community rights. The only connection between them was that each concerned some kind of inconvenience or annoyance and, hence, both were given the common name of nuisance.[24]

Over time, however, the distinction between these two forms of nuisance became blurred as a result of judicial developments. First, while a public nuisance was a crime, the courts held that a civil proceeding would lie at the suit of the Attorney General for an injunction to restrain a present or anticipated public nuisance.[25] This involved a blurring of the distinction between public nuisance and private nuisance for, while the object of the proceeding was to prevent the crime of public nuisance, the proceeding was in civil form, and sought a civil remedy, an injunction.

The second judicial development between the two poles of criminal public nuisance and purely private nuisance was the recognition of a private civil action for a public nuisance. This established the basis for individual standing that persists to this day. In 1536, after centuries of treating public nuisance as a crime only and rejecting private suits in public nuisance, the courts recognized an exception. The crime of public nuisance became a tort, allowing an individual to claim damages or an injunction, where the plaintiff could show damage that was "particular" or "special" to him, and not shared in common with the rest of the public. This departure was a liberalizing rule, for it recognized that a remedy should be available to an individual for a widespread nuisance that substantially affected interests other than land.

The judicial pronouncement establishing the private right action for public nuisance stated as follows:[26]

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[22] Fleming, *supra*, note 20, at 380, and Prosser, "Private Action for Public Nuisance" (1966), Va. L. Rev. 997, at 998.

[23] Fleming, *supra*, note 20, at 380. In Canada, "common nuisance" remains a crime where it "endangers the lives, safety or health of the public, or ... causes physical injury to any person": *Criminal Code*, R.S.C. 1985, c. C-42, s. 180(1).

[24] Fleming, *supra*, note 20, at 380-81. See, also, Prosser, *supra*, note 22, at 999.

[25] This was one of the primary exceptions to the rule that equity will not enjoin a crime: Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, LRC 46 (1980), at 22, *n.* 18.

[26] *Anonymous* (1536), Y.B. 27 Hen. 8, as quoted in Cromwell, *supra*, note 1, at 18 (emphasis added).

> I agree well that each nuisance made in the King's highway is punishable in the lett and not by action, *unless it be where one man has greater hurt or inconvenience than any other man had*, and then he who had more displeasure or hurt, etc., can have an action to recover his damages that he had by reason of the special hurt. . . . As if a man made a trench across a highway, and I come riding that way by night and I and my horse together fall in the trench so that I have great damage and inconvenience in that, I shall have an action against him who made the trench across the road because I am more damaged than any other man.

What entitles the individual to bring proceedings on his own is that he has suffered a "special hurt" as a result of the public nuisance, which distinguishes him from "any other man", that is, from the rest of the public affected generally by the nuisance. The issue of just what constitutes "special hurt" sufficient to give an individual standing has bedevilled the law, and it is to this, and other questions of interpretation, that we shall now turn.

### (d) Interpretation and Application of the Rule

Even a general review of the public nuisance rule demands explanation of three matters that bear upon its application and practical impact. First, consideration should be given to the meaning of public nuisance, for that defines if, and when, the standing principles are to apply at all. Second, one must discuss the nature of the "special hurt" that must be shown by an individual to have standing to bring proceedings on his own, without the consent of the Attorney General. Until recently, a discussion of these two questions would have been sufficient for a basic understanding of the public nuisance rule. However, with the 1986 Supreme Court of Canada decision in *Minister of Finance of Canada v. Finlay*, an express causation requirement was added to the public nuisance rule in its application to litigation seeking to vindicate a public right or interest. This is the third matter that we shall discuss.

We turn first to the threshold consideration of the nature of the harm that constitutes a public nuisance. It should be apparent that this question is of crucial importance, for it determines what principles govern the issue of standing. Given the difference in the treatment of standing, whether an interference is classified as a public nuisance or a private nuisance has profound implications for an individual seeking relief in the courts.

Yet, there is no generally accepted definition of "public nuisance". Cromwell has stated that "[w]hile various formulations have been accepted by the courts, the essence of the matter is that public nuisance is not concerned with interferences with the enjoyment or possession of land but rather with [a] 'right enjoyed by all members of the community' ".[27] With respect to the extent of the

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[27] Cromwell, *supra*, note 1, at 20, quoting from *Muirhead v. Timber Bros. Sand & Gravel Ltd.* (1977), 3 C.C.L.T. 1 (Ont. H.C.J.), at 8. See, also, *St. Lawrence Rendering Co. Ltd. v. City of Cornwall*, [1951] O.R. 669 (H.C.J.), at 672, where Spence J. approved the following definition of public nuisance: "one which inflicts damage, injury or inconvenience upon all the King's subjects or upon all of a class who come within the sphere of its operation".

harm necessary for it to be regarded as an interference with the community, the law does not prescribe that a certain number or percentage of people must be affected. Whether those affected are sufficient to constitute the public is a question of fact in each case, and the public may be the local community particularly affected by the alleged nuisance, rather than the public at large.[28]

On the question whether harm is to be classified as a public nuisance or a private nuisance, while the distinction should, in theory, be easily drawn—given the contrast in the interests protected by the two actions—in practice it appears to be less so. Certain courts have been critical of the distinction.[29] The potential for confusion is illustrated by a statement of the English Court of Appeal that "a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances".[30] Given that private nuisance deals with damage to land, and public nuisance addresses harm to interests other than land, it is difficult to understand this comment.

The second major interpretative question concerns the special harm or interest that an individual must show for him to have standing. Undoubtedly, the most authoritative statement of the rule respecting an individual's standing to sue for public nuisance is that of Buckley J. in *Boyce v. Paddington Borough Council*:[31]

> A plaintiff can sue without joining the Attorney-General in two cases: *first*, where the interference with the public right is such as that *some private right of his is at the same time interfered with* (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, *secondly*, where no private right is interfered with, but the plaintiff, in respect of his public right, *suffers special damage peculiar to himself* from the interference with the public right.

In order for a private plaintiff to have standing to commence an action in public nuisance, he must fall within one of the two exceptions stated in the quoted passage. The private right exception has received scant attention in subsequent case law or academic commentary.[32] Instead, attention has focused primarily on the requirement that an individual show "special damage peculiar to himself".

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[28] See Cromwell, *supra*, note 1, at 20-21, and Linden, *supra*, note 20, at 495. See, also, *Attorney-General v. P.Y.A. Quarries Ltd.*, [1957] 2 Q.B. 169, [1957] 1 All E.R. 894 (C.A.) (subsequent references are to [1957] 1 All E.R.), where Romer L.J. held (at 902) that a nuisance is public if it materially affects the reasonable comfort and convenience of "a class of Her Majesty's subjects", and that not every member of the class need be affected.

[29] Cromwell, *supra*, note 1, at 22.

[30] *Attorney-General v. P.Y.A. Quarries Ltd.*, *supra*, note 28, at 906. See, also, *A.G.B.C. v. Couillard* (1984), 59 B.C.L.R. 102, 11 D.L.R. (4th) 567 (S.C.).

[31] [1903] 1 Ch. 109, at 114, (1902), 72 L.J. Ch. 28 (subsequent references are to [1903] 1 Ch.) (emphasis added). In *Finlay*, *supra*, note 11, at 329, Le Dain J. referred to this pronouncement as the "statement of the rule that has been most often cited".

[32] But see *Finlay*, *supra*, note 11, at 330, where Le Dain J. commented as follows:

Controversy about the meaning of the special damage requirement has been reflected in the debate about the so-called "kind-degree distinction". At issue is whether a plaintiff, in order to satisfy the special damage test, must demonstrate that the damage that she has suffered differs in degree from that suffered by the rest of the public, or whether she must demonstrate that the damage was of a kind different from that inflicted generally. On this question, the courts have been divided, as have the academic commentators.[33] The more restrictive approach, requiring a difference in kind, has been approved by the Ontario Court of Appeal[34] and, in *dicta*, by the Supreme Court of Canada.[35] Whatever the uncertainty about the standard to be met, Cromwell asserts that "[i]t appears to be settled that personal injury or property damage suffered by the plaintiff will always qualify as special damage regardless of the number of persons who suffer similar losses".[36]

The practical significance of the kind-degree distinction is well illustrated by contrasting the results of some of the noteworthy cases. In three cases from the maritime provinces, courts refused standing to commercial fishermen who suffered a loss of livelihood arising from pollution that killed fish in public waters. In each case, the court held that the injury that the fisherman had suffered differed merely in degree, but not in kind, from the rest of the public.[37] By contrast, there are Ontario cases that have held that financial loss incurred by commercial shipping concerns, due to navigation obstructions on public waterways, did constitute special damage.[38] Thus, in essentially similar circumstances, courts applying the "difference in kind" test came to opposite results.

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> The 'private right' referred to by Buckley J. has been said to be 'a right the invasion of which gives rise to an actionable wrong within the categories of private law, for example, a breach of contract or trust or the commission of a tort'. . . . It has also been observed that the exception for private rights applies not only to common law rights but to a right created by statute for the benefit of a plaintiff.

33 For a discussion, see Cromwell, *supra*, note 1, at 24-27.

34 See *Turtle v. City of Toronto* (1924), 56 O.L.R. 252 (App. Div.), at 277, and *Grant v. St. Lawrence Seaway Authority*, [1960] O.R. 298, at 303, 23 D.L.R. (2d) 252 (C.A.).

35 *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243, at 255-56, 66 D.L.R. 287.

36 Cromwell, *supra*, note 1, at 24.

37 *Hickey v. Election Reduction Co.* (1970), 2 N. & P.E.I.R. 246, 21 D.L.R. (3d) 368 (Nfld. S.C.); *McRae v. British Norweigan Whaling Co.*, [1927-31] Nfld. L.R. 274 (S.C.); and *Fillion v. New Brunswick International Paper Co.*, [1934] 3 D.L.R. 22, 8 M.P.R. 89 (N.B.C.A.). But see *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(3), which gives licensed commercial fishermen the right to recover for loss of income resulting from the unauthorized deposit of a deleterious substance in water.

38 *Crandell v. Mooney* (1878), 23 U.C.C.P. 212 (C.A.); *Rainy River Navigation Co. v. Ontario and Minnesota Power Co.* (1914), 26 O.W.R. 752, 17 D.L.R. 850 (App. Div.); and *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 26 O.W.R. 456, 6 O.W.N. 537 (App. Div.). See, also, *O'Neil v. Harper* (1913), 28 O.L.R. 635, 13 D.L.R. 649 (App. Div.); *Drake v. Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251 (C.A.); and *Ireson v. Holt Timber Co.* (1914), 30 O.L.R. 209, 18 D.L.R. 604 (App. Div.). For discussion, see McLaren, "The Common Law Nuisance Actions and the Environmental Battle – Well-Tempered Swords or Broken Reeds?" (1972), 10 Osgoode Hall L.J. 505, at 512-14, and Estey, "Public Nuisance and Standing to Sue" (1972), 10 Osgoode Hall L.J. 563, at 572-73.

As we have indicated, in the *Finlay* decision the Supreme Court of Canada in effect introduced a new element to the public nuisance rule in the form of an express requirement of causation. We shall consider this decision in more detail later in the chapter, for its greater significance lies in the extension of the court's discretionary approach to standing in constitutional challenges, developed in its standing trilogy, to a non-constitutional challenge involving the statutory authority for administrative action, and in the court's elaboration of the meaning of its discretionary test. At this point, we wish to address only its impact on the interpretation and application of the public nuisance rule.

Speaking for the court, Mr. Justice Le Dain drew on the American standing jurisprudence, which includes a requirement that there be a "nexus" or "causative relationship . . . between the injury or prejudice complained of and the action attacked".[39] He held that "a similar requirement of directness or causal relationship between the alleged prejudice or grievance and the challenged action is implicit in the notions of interference with private right and special damage".[40] Accordingly, a plaintiff would have to show both that the impugned conduct had caused the injury or prejudice suffered and that he would "stand to benefit in his personal interests"[41] if the relief sought were granted by the court. Le Dain J. found that Mr. Finlay did have "a direct personal interest" in establishing the illegality of the action that he challenged, but his failure to demonstrate the necessary causal relationship was fatal to his standing under the public nuisance rule.[42] However, the court did conclude that he had standing to proceed under the discretionary approach to standing developed in the trilogy.[43]

The impact of the public nuisance rule on the law of standing in general has been enormous. In the introduction to this chapter, we indicated that the rule has been applied not only in cases of public nuisance but, in the words of *Finlay*, "in a variety of public law contexts where an issue of public right or interest has been raised".[44] Its impact has been felt particularly in environmental law, where the requirement of showing interference with a private right or special damage has frustrated attempts by individuals to stop or prevent pollution. In this context, the application of the rule has been controversial and has been severely criticized.[45]

Until 1974, the public nuisance rule had come to govern the determination of the standing question in all areas that could be regarded as involving the

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[39] *Minister of Finance of Canada v. Finlay*, *supra*, note 11, at 332.

[40] *Ibid.*, at 333.

[41] *Ibid.*

[42] For a discussion, see Bogart II, *supra*, note 2, at 382-86, and Cromwell, *supra*, note 2, at 108-09.

[43] See discussion, *infra*, this ch., sec. 3.

[44] *Supra*, note 11, at 329.

[45] See, for example, Roman, *supra*, note 2; Estey, *supra*, note 38; and McLaren, *supra*, note 38. See, also, *Environmental Protection Act*, *supra*, note 6, s. 87, which, *inter alia*, gives any person the right to compensation for loss or damage incurred as a direct result of a spill.

public interest or public rights, except where the requirements for individual standing were expressly provided in a statute or where a prerogative remedy was sought. In the case of the prerogative remedies, an entirely different approach to standing prevailed, which we shall review later in this chapter.[46]

In early 1974, the Supreme Court of Canada delivered its historic decision in *Thorson v. Attorney General of Canada*,[47] in which it held that the public nuisance rule was not appropriate to determine whether an individual should have standing in a challenge to the constitutional validity of legislation, and that a different approach to standing should be followed. In subsequent decisions, the court further considered its new approach to standing, and recently applied it in a non-constitutional challenge. In sum, these developments constitute what we earlier called the second thread of standing law in Ontario.

## 3. THE SUPREME COURT OF CANADA'S STANDING "QUARTET"

The Supreme Court of Canada's approach to standing in its quartet of cases distinguishes the law in Canada from that in England and the United States. The principles that the Supreme Court developed in these cases apply to constitutional challenges to legislation and to certain, as yet unsettled, challenges to administrative action that are not based on constitutional grounds. With respect to standing under the *Canadian Charter of Rights and Freedoms*, while it would appear that standing to apply for a declaration of invalidity under section 52 is governed by the same approach, we prefer to consider the Charter separately in this chapter, for there is a second, very different, issue of standing in connection with the remedies provision of the Charter, section 24.[48]

Before examining the quartet at some length, we shall briefly review the Supreme Court of Canada's 1924 decision in *Smith v. Attorney General of Ontario*,[49] which was accepted as the authoritative ruling on standing to obtain a declaration with respect to the constitutional validity of legislation until the decision in *Thorson* fifty years later.[50]

The *Smith* case concerned a resolution of the Ontario legislature that, in effect, prohibited the importation of intoxicating liquor into Ontario. Smith, an Ontario resident, had placed an order with a dealer in Montreal, who had refused to fill the order because it would infringe the relevant legislation.

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46 See *infra*, this ch., sec. 5.

47 *Supra*, note 8.

48 See *infra*, this ch., sec. 4.

49 [1924] S.C.R. 331, [1924] 3 D.L.R. 189 (subsequent references are to [1924] 3 D.L.R.). For a discussion, see Cromwell, *supra*, note 1, at 70-74.

50 Cromwell, *supra*, note 1, at 74, observes that *Smith* was taken to settle standing in constitutional cases, even though the case itself did not concern "any constitutional issue in the traditional sense".

Smith then sought a declaration that the resolution was invalid; the only other means of testing the resolution would have been to contravene the law and risk prosecution and penalty. Smith argued that he should not be obliged to clarify the matter at the risk of liability.

The court held that Smith did not have standing to bring the proceedings. In the separate judgments, two main strands of reasoning can be discerned. First, since the liquor was not in fact shipped, and therefore Smith was not subject to any actual risk of prosecution, his action was regarded as "merely speculative".[51] Second, in two of the judgments the public nuisance rule was applied, although in neither was this acknowledged expressly. Duff J. stated that "[a]n individual . . . has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act".[52] Using different language, Mignault J. would have required an individual to show a "special interest".[53]

In applying the public nuisance rule, both Duff J. and Mignault J. relied upon one of the main rationalia used to justify the rule, namely, that it is necessary to prevent a "flood" of similar actions. We shall consider this rationale at some length in the next chapter.[54] But given the importance of this justification, it bears quoting Mr. Justice Duff's remarks here:[55]

> [T]o accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a Province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.

In his view, this would lead to "grave inconvenience".[56]

Notwithstanding the fundamental changes wrought by the Supreme Court of Canada's standing quartet, the *Smith* case has never been expressly overruled. Moreover, it is clear from the *Finlay* decision that, in deciding whether a person has standing to seek a declaration as to the validity of legislation or administrative action, the public nuisance rule remains part of a court's inquiry, since it is only where the plaintiff fails to be granted standing under that rule that the court

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[51] *Supra*, note 49, at 190 (*per* Idington J.). Duff J., *ibid.*, at 192, quoted from *Glasgow Nav. Co. v. Iron Ore Co.*, [1910] A.C. 293, at 294, that "it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical set of facts".

[52] *Supra*, note 49, at 193-94.

[53] *Ibid.*, at 202.

[54] *Infra*, ch. 3, sec. 2(b)(ii)a.

[55] *Supra*, note 49, at 193.

[56] *Ibid.*, at 193. In the same vein, Mignault J. stated that "the inconvenience of allowing actions of this nature . . . is too obvious for discussion" (*ibid.*, at 202).

takes the liberal discretionary approach of the quartet. However, while technically still part of the landscape of standing, in fact the rule is unimportant in this context, for it has been effectively displaced by the discretionary approach.

In *Thorson v. Attorney General of Canada*,[57] Thorson brought proceedings for a declaration that the *Official Languages Act*[58] was *ultra vires* Parliament. In seeking to establish his standing, he relied on the "ratepayer's exception" to the public nuisance rule, which had been accepted by the court in *MacIlreith v. Hart*.[59] Thorson had argued that all taxpayers were prejudiced by these allegedly illegal expenditures in the same way that the ratepayers had been affected in *MacIlreith*; Thorson had neither alleged nor demonstrated that he had suffered any special or particular damage as a result of the legislation in issue.

Thorson had requested the Attorney General of Canada to take appropriate proceedings to test the validity of the legislation; however, the Attorney General declined. When Thorson commenced the action personally, he served the Attorney General as the defendant, in his capacity as legal representative of the Crown.

The majority granted Thorson standing to proceed with his suit on the basis that standing to challenge the constitutionality of federal legislation was a matter for the discretion of the court, rather than a matter governed simply by the public nuisance rule. What distinguishes the *Thorson* judgment, aside from its adoption of an entirely novel approach to standing, was the court's apparent willingness to examine critically the traditional, accepted reasons advanced in support of the rules governing standing, and to evaluate the consequences of strict adherence to those rules, in the constitutional context.

Speaking for the majority, Laskin J. unequivocally rejected the automatic application of the public nuisance standing rule to constitutional litigation:[60]

> This is not a principle which is capable of wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit Legislatures, and with the validity of the legislation of one or other of those two levels. There is no question in such a case of respecting legislative sovereignty, as in unitary Great Britain, but rather a question of whether Parliament or a Legislature has itself respected the limits of its authority under the Constitution.

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[57] *Supra*, note 8.

[58] R.S.C. 1970, c. O-2. See, now, R.S.C. 1985, c. O-3.

[59] (1908), 39 S.C.R. 657. In this case, the Supreme Court of Canada held that a ratepayer of a municipality had standing to bring a class action against the mayor for a declaration that a payment made to him by the city council was illegal. There were three judgments. Davies J., with whom Duff J. concurred, found that the special damage requirement had been met by virtue of the increased rate that the plaintiff would have to pay as a consequence of the illegal payment.

[60] *Supra*, note 8, at 10.

The validity of the "floodgates" argument, one of the traditional buttresses supporting the public nuisance standing rule, was dismissed. Laskin J. observed that courts were capable of controlling declaratory actions by other means, adding that judicial recognition of individual standing in ratepayer suits did not "[spawn] any inordinate number of ratepayer's actions to challenge the legality of municipal expenditures".[61] In his view, any concern about a multiplicity of actions paled in comparison with the "more telling consideration"[62] that questions of constitutionality would be "immunized from judicial review"[63] if no one had standing to bring proceedings on his own. Such would be the result if the public nuisance rule were applied:[64]

> That . . . is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff's action is a justiciable one; and, *prima facie*, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

With respect to the control of the Attorney General as guardian of the public interest under the public nuisance rule, Laskin J. contrasted the role of the Attorney General in Canada, a federal state, with that of the Attorney General in Great Britain. In the course of considering whether a request to the Attorney General should be required before an individual is granted standing, he stated as follows:[65]

> I doubt, however, whether such a condition can have any application in a federal system where the Attorney-General is the legal officer of a Government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation.

By contrast, explained Mr. Justice Laskin, in "unitary Great Britain where there is no unconstitutional legislation . . . the Attorney General where he proceeds as guardian of the public interest, does so against subordinate delegated authorities".[66] Rather than leaving standing to be determined by the Attorney General in the absence of any person who is particularly affected, the majority decided that standing should rest in the discretion of the court.

In allowing Thorson's action to proceed, the majority relied on the ratepayer actions[67] in which the "restrictive principle of requiring carriage of

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[61] *Ibid.*, at 7.

[62] *Ibid.*

[63] *Ibid.*

[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*, at 13-14.

the suit by the Attorney-General and denying any suit if the Attorney-General refuses to act, has been cast aside".[68] The majority dismissed the view that the reason that ratepayers were accorded standing was that they had suffered special damage peculiar to themselves as ratepayers in the increased rates that they would have to bear as a consequence of the illegal expenditures. According to Laskin J., "obeisance to the special damage was purely formal"[69] in the leading case of *MacIlreith v. Hart*. Equally important was the fact that a municipal council had continued to ignore illegal expenditures of public money. In such circumstances, should the Attorney General be disinclined to intervene, the wrong would go uncorrected.

In *Thorson*, therefore, the court clearly stated that a taxpayer's standing to seek a declaration concerning the constitutional validity of federal legislation was a matter for the exercise of judicial discretion. The court explained that two factors were important to the exercise of that discretion.

First, the court regarded the justiciability of the issue as "central",[70] and accepted that the "constitutionality of legislation has in this country always been a justiciable question".[71] The underlying concern was that a justiciable issue should not be kept from being adjudicated.

The second factor concerned the nature of the legislation under challenge. The court distinguished between two classes of legislation, that is, "regulatory" legislation and "directory and declaratory" legislation. Regulatory legislation, the type of legislation at issue in *Smith*, establishes a compulsory scheme to which certain persons or activities must conform under threat of sanction. Only those governed by the legislation would have standing to challenge it, thus excluding "a mere taxpayer or other member of the public".[72] Directory and declaratory legislation, such as the *Official Languages Act*, establishes no offences, and imposes no penalties or duties. Accordingly, since the entire public is similarly affected, unless the court has a discretion to grant an individual standing where the Attorney General declines to act, there would be no way that a justiciable issue of constitutional validity could be brought before the courts for decision.

The significance of the distinction between regulatory legislation and directory and declaratory legislation was short-lived. It endured only until the

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[68] *Ibid.*, at 14.

[69] *Ibid.*, at 15.

[70] *Ibid.*, at 18.

[71] *Ibid.*, at 11.

[72] *Ibid.*, at 8. But note that later Laskin J., *supra*, note 8, at 18, stated that "[i]f it is legislation [involving prohibition or restrictions on persons who would be, therefore, particularly affected] . . . the Court *may* decide, as it did in the *Smith* case, that a member of the public, and perhaps even one like Smith, is too remotely affected to be accorded standing" (emphasis added).

court's decision the following year in *Nova Scotia Board of Censors v. McNeil*.[73]

In *McNeil*, the Supreme Court of Canada again considered the standing of a taxpayer to challenge the constitutionality of legislation. McNeil had sought a declaration that the Nova Scotia *Theatres and Amusements Act*[74] and certain of its regulations were *ultra vires* the Legislature. A newspaper editor, he challenged the authority of the Nova Scotia Board of Censors to prohibit the exhibition of a film.

In an unanimous decision of the full court, McNeil was granted standing, even though the legislation in issue was regulatory rather than declaratory, for it did particularly affect certain members of the public, such as film exchanges, theatre owners, and film operators, who risked sanction for contravention of its provisions.

Mr. Justice Laskin delivered the judgment of the court. With respect to the distinction between classes of legislation that was drawn in *Thorson*, he stated that "[i]t was not a [controlling] distinction . . . especially in the light of the reserve of discretion in the Court, and more especially because the word or the term 'regulatory' is not a term of art . . . which would in all cases serve to distinguish those in which standing to a taxpayer or citizen would be granted and those in which it would not".[75]

While acknowledging that the impugned legislation directly regulated an identifiable group of theatre owners and film exchanges, on whom it therefore had "a more direct effect",[76] the court found that it also "directly affected" members of the public by determining what films they could view. Members of the public, McNeil included, were therefore considered to have a "real stake"[77] in the validity of the legislation.

The decision to grant standing was based on two other factors: first, the case raised "a serious, a substantial constitutional issue"[78] and, second, given that McNeil had taken all reasonable steps to have the issue adjudicated—including requesting the Attorney General to refer the matter to the Appeal

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[73] *Supra*, note 9. For discussion, see Cromwell, *supra*, note 1, at 79-82, and Mullan, *supra*, note 2.

[74] R.S.N.S. 1967, c. 304.

[75] *Supra*, note 9, at 635.

[76] *Ibid.*, at 637.

[77] *Ibid.*, at 635. Laskin J. (at 637) explained as follows:

> The challenged legislation does not appear to me to be legislation directed only to the regulation of operators and film distributors. It strikes at the members of the public in one of its central aspects.

[78] *Ibid.*, at 634.

Division of the Nova Scotia Supreme Court—this justiciable issue might never be litigated if standing were denied. In the words of *Thorson*, the allegedly invalid legislation otherwise would be "immunized from judicial review".[79]

In his treatise, Cromwell describes the impact of *McNeil* as follows:[80]

> *McNeil* reinforced the view that standing to seek declarations concerning constitutional validity was a matter for judicial discretion and put an end to the notion that the *Thorson* classification of legislation as either regulatory or directory controlled the standing issue. The importance of the justiciability of the question to be litigated was reaffirmed, although not further explained. The availability of alternate effective means of bringing the question before the courts emerged even more clearly than it had in *Thorson* as an important consideration. If there had been doubt, *McNeil* made it plain that the *Thorson* discretionary approach applied equally to challenges to provincial as to federal legislation.

In *Minister of Justice of Canada v. Borowski*,[81] the Supreme Court of Canada further expanded the basis for individual standing. The plaintiff had sought

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[79] *Supra*, note 8, at 7.

[80] Cromwell, *supra*, note 1, at 80. Professor Mullan, *supra*, note 2, at 41, suggested that, where a plaintiff fails to meet the public nuisance test, a court should consider "at least some and perhaps all of the following factors":

(1) *The legislation*

(a) Is its constitutionality justiciable?

(b) Where in the spectrum does it fit between regulatory legislation on one hand and declaratory or directory legislation on the other?

(c) Is it likely to be challenged by anyone within the ordinary standing rules?

(d) Who are affected by the legislation and are they affected in a significant way?

(e) Is there a substantial, serious question raised by the challenge?

(f) Will grave inconvenience result from (i) allowing this litigation to proceed, and (ii) the possible invalidity of the statute under challenge?

(2) *The plaintiff*

(a) Is the plaintiff directly affected by the legislation, either as a member of the public or in some other capacity?

(b) Has the plaintiff explored other avenues of having the constitutional validity of the legislation tested?

[81] *Supra*, note 10. For contrasting views on the significance of *Borowski*, compare Cromwell, *supra*, note 1, at 83-92, and Mullan and Roman, *supra*, note 2. See, also, Chester, *supra*, note 2; Swartzenberger, "*The Minister of Justice of Canada v. Joseph Borowski & Attorney General of Ontario et al.*" (1982), 20 Alberta L. Rev. 503; and Blake, "*Minister of Justice v. Borowski*: The Inapplicability of Standing Rules in Constitutional Litigation" (1982), 28 McGill L.J. 126.

a declaration stating that the *Criminal Code*[82] provisions permitting abortions in certain circumstances were inoperative because they offended certain provisions of the *Canadian Bill of Rights*,[83] and that any expenditure of public money to support therapeutic abortions performed in compliance with the *Criminal Code* was therefore illegal.

In a majority judgment, delivered by Mr. Justice Martland, the court held that Borowski did have standing.[84] Unlike in the case of *Thorson* and *McNeil*, the court explicitly adopted a test for standing, which it drew from these decisions:[85]

> I interpret [*Thorson* and *McNeil*] as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action.

In its test, the court seems to posit two alternatives. Assuming that there is a serious issue concerning the invalidity of the legislation, a plaintiff must demonstrate either that he is directly affected by the legislation, or that his interest is genuine and there is no other reasonable and effective way to have the issue adjudicated. The first branch incorporates *Smith*, whereas the second branch is a succinct version of the discretionary test developed in *Thorson* and *McNeil*. In the test, no express mention is made of justiciability, which figured so prominently as a consideration in *Thorson*, and was affirmed as such in *McNeil*.

In granting Borowski standing, the majority seemed to consider that its decision was a natural, if not inevitable, extension of the principles developed in *Thorson* and *McNeil*. In his review of these cases, Martland J. paid particular attention to the relationship between the plaintiff and the challenged legislation. In *Thorson*, he recognized that, "although a person might not be specially affected or exceptionally prejudiced by the legislation which he sought to attack",[86] he could nevertheless seek a declaratory judgment. The *McNeil* decision "went beyond the *Thorson* judgment"[87] in recognizing that a person could have status to attack the validity of legislation "even though there existed classes of persons who were specially affected and who might be exceptionally

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82 R.S.C. 1970, c. 34, s. 251(4), (5), and (6), as am. by S.C. 1974-75-76, c. 93, s. 22.1. See, now, R.S.C. 1985, c. C-46, s. 287.

83 R.S.C. 1970, App. III. See, now, R.S.C. 1985, App. III.

84 Laskin J. dissented.

85 *Supra*, note 10, at 606.

86 *Ibid.*, at 603.

87 *Ibid.*, at 604.

prejudiced by it".[88] The *Criminal Code* provisions at issue in *Borowski* were neither regulatory nor "declaratory or directory"; they were exculpatory, allowing conduct that otherwise would be criminal and providing an exemption from criminal liability. As such, Martland J. explained, "it is difficult to find any class of person directly affected or exceptionally prejudiced by it who would have cause to attack the legislation".[89] In his view, Borowski's position was "at least as strong"[90] as that of McNeil, since in this case there were "no persons directly affected who could effectively challenge the legislation".[91]

Since, in *Borowski*, the plaintiff was obviously not even "directly affected"[92] by the legislation, his only connection to it was as a "concerned citizen"[93] who wanted the issue to be adjudicated. Returning to *Thorson*, Martland J. described the plaintiff in that case as "an interested citizen"[94] challenging legislation that did not directly affect him. The clear implication is that, as long as the plaintiff shows a "genuine interest"[95] in the issue, he can challenge the constitutional validity of legislation, even though that legislation affects him no differently than any other person.

The *Borowski* decision represented an extension of the principles developed in *Thorson* and *McNeil*, insofar as it applied them to challenges based on the *Canadian Bill of Rights*. More significantly, in applying its test, the court accorded standing to a person with a "genuine interest", who was not directly affected by the legislation, even though others were directly affected "in the traditional legal sense".[96]

In a recent decision,[97] the Supreme Court of Canada dismissed Mr. Borowski's appeal on the grounds that it had become moot and that Mr. Borowski no longer had standing to continue the proceedings. What had changed the

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[88] *Ibid.*, at 605.

[89] *Ibid.*

[90] *Ibid.*, at 606.

[91] *Ibid.* Martland J. concluded (*ibid.*, at 605-06) that doctors, whether or not they performed abortions, would have no reason to bring proceedings. Nor would hospitals, regardless of their position, and pregnant women and their husbands. Finally, he concluded that unborn human foetuses, on whom these *Criminal Code* provisions would have a direct impact, could not bring proceedings.

[92] The term was used in *McNeil*, *supra*, note 9, at 637, to describe the relationship between the plaintiff and the legislation under attack.

[93] *Supra*, note 10, at 606.

[94] *Ibid.*

[95] *Ibid.*

[96] Mullan and Roman, *supra*, note 2, at 318-19.

[97] *Borowski v. Attorney General of Canada*, unreported (March 9, 1989, S.C.C.).

situation in the interim was the court's decision in *R. v. Morgentaler (No. 2)*,[98] which held that the abortion section of the *Criminal Code* was invalid in its entirety as violating section 7 of the *Canadian Charter of Rights and Freedoms*.

Until the Supreme Court of Canada decision in *Finlay*, there was controversy about whether the discretionary approach to standing adopted in the court's trilogy would apply beyond the context of constitutional challenges. On this question, courts in Ontario and in other provinces were divided. While some favoured extending the discretionary approach to challenges not having a constitutional basis and to remedies other than the declaration, others refused to do so.[99] However, with respect to private actions in public nuisance brought, for example, to protect the environment, there has not been similar uncertainty: the trilogy has had no impact in environmental law, where the public nuisance rule has continued to prevail.[100]

In *Minister of Finance of Canada v. Finlay*,[101] Finlay brought proceedings for a declaration that payments by Canada to Manitoba, made as contributions to the provincial system of assistance, were illegal because they were in contravention of the *Canada Assistance Plan*.[102] Under the Plan, payments were made subject to conditions and undertakings contained in the legislation and federal-provincial agreements. Finlay argued that the Manitoba assistance system, established under the relevant provincial legislation,[103] was in breach of certain undertakings, and, therefore, the contributory payments by the federal government were contrary to statutory authority. In addition to declaratory relief, Finlay sought an injunction to stop the payments.

Mr. Justice Le Dain delivered the court's decision. In his words, what was at issue was standing in a "non-constitutional challenge to the statutory authority for administrative action",[104] and whether the approach to standing in constitutional challenges, adopted by the court in the trilogy, should be applied to it.

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98 [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

99 See, generally, Cromwell, *supra*, note 1, at 136-47. On the impact of the quartet on the prerogative remedies available, in Ontario, under the *Judicial Review Procedure Act*, see *infra*, this ch., sec. 5.

100 See, for example, *Bolton v. Forest Pest Management Institute* (1985), 66 B.C.L.R. 126, 21 D.L.R. (4th) 242 (C.A.); *Stein v. Gonzales* (1984), 58 B.C.L.R. 110, 14 D.L.R. (4th) 263 (S.C.); and *Re Greenpeace Foundation of British Columbia and Minister of the Environment*, [1981] 4 W.W.R. 587, 122 D.L.R. (3d) 179 (B.C.S.C.).

101 *Supra*, note 11. For commentary, see Bogart II, *supra*, note 2, and Cromwell, *supra*, note 2.

102 R.S.C. 1970, c. C-1. See, now, R.S.C. 1985, c. C-1.

103 *Social Allowances Act*, R.S.M. 1970, c. S160, ss. 11(5)(b) and 20(3), as en. by S.M. 1980, c. 37, s. 10, and *Municipal Act*, S.M. 1970, c. 100, s. 444.

104 *Supra*, note 11, at 327.

In analyzing the question of Finlay's standing, Le Dain J. posed the following three questions, which he proceeded to consider in the course of his judgment:[105]

> 1. Does the respondent [Finlay] have a sufficient personal interest in [the issue] to bring him within the general requirement for standing to challenge an exercise of statutory authority by an action for a declaration or an injunction?
>
> 2. If not, does the court have a discretion to recognize public interest standing in the circumstances of the present case?
>
> 3. If the court does have such a discretion should it be exercised in favour of the plaintiff?

The first question involved a consideration of whether Finlay met the test for individual standing under the public nuisance rule, as articulated in *Boyce v. Paddington Borough Council*.[106] As we explained in our earlier discussion,[107] the most notable aspect of the court's examination of this question was its introduction of a causation or "nexus" requirement into the public nuisance rule, which it borrowed from the American standing jurisprudence. The court found that, while Finlay had "a direct, personal interest"[108] in demonstrating that the province did not comply with the conditions and undertakings imposed by the *Canada Assistance Plan*, he failed to show the requisite "causative relationship";[109] a declaration that the federal payments were illegal would neither affect the validity of the offending provincial legislation nor assure that Manitoba would amend them.

Having held that Finlay did not have standing under the public nuisance rule, the court turned to the second question, that is, whether the discretionary approach to standing developed in the trilogy applied to this non-constitutional challenge to administrative action based on a lack of statutory authority. After a review of *Thorson*, *McNeil*, and *Borowski*, Le Dain J. concluded that the three cases could not be interpreted as "providing clear and direct authority for the recognition of public interest standing, as a matter of judicial discretion, to bring a non-constitutional challenge by an action for a declaration to the statutory authority for public expenditure or other administrative action".[110] Nor, he added, did they clearly exclude such recognition.

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[105] *Ibid.*, at 326.

[106] *Supra*, note 31.

[107] *Supra*, this ch., sec. 2(d).

[108] *Supra*, note 11, at 333.

[109] *Ibid.*, at 334.

[110] *Ibid.*, at 339.

Since the matter was not resolved by the trilogy itself, the court proceeded to consider whether its approach, as a matter of policy, should be extended to the non-constitutional challenge before it. Mr. Justice Le Dain articulated the fundamental policy issue as follows:[111]

> This question raises again the policy considerations underlying judicial attitudes to public interest standing, and in particular, whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this court in *Thorson*, *McNeil* and *Borowski* to the public interest in the maintenance of respect for the limits of legislative authority.

Le Dain J. accepted that the same value should be given to the public interest in the maintenance of respect for the limits of administrative authority. He suggested that recognition of the public interest in respecting these limits was indicated by the fact that the Attorney General has standing to bring proceedings, either on his own or through a relator, to ensure that they are being observed.

Having accepted the importance of ensuring that administrative action conforms to statute, Mr. Justice Le Dain justified adopting a discretionary approach to standing "[f]or the reasons indicated in *Thorson*".[112] His discussion of *Thorson* should therefore reveal the policy considerations justifying the extension of the trilogy beyond its constitutional boundaries. Le Dain J. stated that "the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation . . . was the dominant consideration of policy in *Thorson*".[113] What seems to underlie the *Finlay* decision, then, is a similar conviction that the question whether administrative action conforms to statutory authority—which the court accepted as being a matter of the public interest—should not be kept from judicial scrutiny.

In considering whether Finlay should be granted standing, the court applied the test articulated by Mr. Justice Martland in *Borowski*. The court elaborated on the meaning of the test by explaining that the criteria relevant to the exercise of the discretion to recognize what it called "public interest standing"[114] addressed "traditional judicial concerns about the expansion of public interest standing".[115] The court summarized these concerns as follows:[116]

> [T]he concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government.

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111 *Ibid.*

112 *Ibid.*

113 *Ibid.*, at 336-37.

114 *Ibid.*, at 340.

115 *Ibid.*

116 *Ibid.*

The court explained that the requirement of justiciability responded to the concern about the proper role of the courts and their constitutional relationship to the other branches of government. It read the *Thorson* decision as implying that justiciability is "a matter of particular concern in the recognition of public interest standing".[117] The court interpreted the statement of Wilson J. in *Operation Dismantle Inc. v. The Queen*[118] to mean that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government".[119] It concluded that the issues raised by Finlay were justiciable.

The requirements of the standing test that there be a "serious issue" raised and that a citizen have a "genuine interest" in the issue addressed judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody. The court found that Finlay satisfied both requirements, insofar as the issues raised by Finlay were "far from frivolous"[120] and deserved the consideration of a court, and his complaint about suffering prejudice demonstrated that he was a person with a genuine interest in the issues.

The court explained that the requirement that there be no other reasonable and effective manner in which the issue may be brought before a court responded to the concern that, in the determination of an issue, a court should have the benefit of the contending views of the persons most directly affected by the issue. The court found that Finlay met this requirement, concluding from the nature of the legislation under attack that "there could be no one with a more direct interest than the plaintiff in a position to challenge the statutory authority to make the federal cost-sharing payments".[121] Nor did it think that a prior request to the Attorney General to take proceedings was necessary to show that there was no other way that the issue might be adjudicated, since it was evident that the Attorney General would not have consented to a relator action.

The court concluded therefore that it should exercise its discretion in favour of granting Finlay standing. Mr. Finlay eventually succeeded on the merits.[122]

The *Finlay* decision was significant in three respects. It extended the trilogy's approach to standing to a non-constitutional challenge to the statutory authority for an administrative action. The court also made it clear that its discretionary approach should apply to claims for injunctive relief, as well as

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117 *Ibid.*

118 [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 (subsequent references are to 18 D.L.R. (4th)).

119 *Finlay*, *supra*, note 11, at 340.

120 *Ibid.*, at 341.

121 *Ibid.*

122 *Minister of Finance of Canada v. Finlay*, unreported (January 24, 1989, F.C., T.D.).

proceedings for declaratory relief.[123] More fundamentally, the reasoning of the court evinces a concern that individuals seeking to raise important issues respecting the legality of government action should be assured of access to the courts.

## 4. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A consideration of standing under the *Canadian Charter of Rights and Freedoms*[124] involves an examination of two provisions, section 24 and section 52. Since the question of standing is subject to very different treatment under these provisions, we shall review them separately.[125]

### (a) Section 24(1)

Section 24(1) provides a court with broad remedial powers in respect of Charter infringements, and stipulates its own standing requirements:[126]

> 24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

As one commentator has remarked, under section 24 of the Charter, Mr. Borowski would not have had standing to seek a declaration or injunction.[127] The standing requirements of section 24(1) have been described as "stricter than those of many other remedies which are available for unconstitutional action".[128] Given that the focus of the provision is on whether one has suffered an infringement or denial of a right or freedom, it is clear that the approach to standing in the quartet would be irrelevant to standing under section 24(1).

### (b) Section 52(1)

Although section 24(1) is available only for Charter infringements, the reverse is not true: "section 24(1) is not the exclusive remedy for Charter

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123 *Ibid.*, at 342-43.

124 *Supra*, note 5.

125 See, generally, Cromwell, *supra*, note 1, at 95-102, and Bogart II, *supra*, note 2.

126 As Professor Hogg points out in *Constitutional Law of Canada* (2d ed., 1985), at 694, s. 24(1) is available only for a breach of the Charter, and not for unconstitutional action in general—for example, in proceedings alleging that legislation is outside the legislative competence of a legislature or Parliament under the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.).

127 Murphy, "L'intérêt à poursuivre en vertu du paragraphe 24(1) de la Charte canadienne des droits et libertés" (1986), 35 U.N.B.L.J. 188, at 189.

128 Hogg, *supra*, note 126, at 695.

infringements".[129] Section 52(1) is another avenue available to an applicant who alleges a contravention of the Charter:

> 52.—(1) The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

It has been noted that, since the phrase "Constitution of Canada" includes the Charter, any law that is inconsistent with the Charter is "of no force or effect".[130] The potential impact of this section is significant because its scope has been interpreted very liberally. In *Operation Dismantle Inc. v. The Queen*,[131] the reference to "law" in section 52(1) was interpreted to include "all acts taken pursuant to powers granted by law", and was not restricted to statutes, regulations and the common law.[132]

Unlike section 24(1), section 52(1) does not contain its own standing prerequisites. However, on several occasions, the Supreme Court of Canada has expressed the view that, in an application under section 52, a person would have to meet the standing requirements established by the trilogy.[133]

## 5. *JUDICIAL REVIEW PROCEDURE ACT:* PREROGATIVE REMEDIES

In Ontario, the prerogative remedies no longer exist as separate forms of relief available under individual prerogative writs. Since 1972, the *Judicial Review Procedure Act*,[134] has provided for an application for judicial review to seek the relief that the person would be entitled to in "proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari".[135] Until the coming into force of this Act, *mandamus*, prohibition, and *certiorari* were independent prerogative writs, which had their separate origins and which were governed by different substantive principles.[136]

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[129] *Ibid.*, at 694.

[130] *Ibid.*, at 693. Division of powers issues, of course, would be comprehended as well.

[131] *Supra*, note 118.

[132] *Ibid.*, at 494.

[133] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R 295, 18 D.L.R. (4th) 321, at 336; *Operation Dismantle Inc. v. The Queen*, *supra*, note 118, at 512; and *Borowski v. Attorney General of Canada*, *supra*, note 97, at 24.

[134] *Supra*, note 4.

[135] *Ibid.*, s. 2(1)1.

[136] These were not the only prerogative writs; *habeus corpus*, for example, was a prerogative writ. For a discussion of the historical origins of the prerogative writs, see Evans, *de Smith's Judicial Review of Administrative Action* (4th ed., 1980), at 584-95.

Before turning to the question of standing, it is necessary to describe these prerogative remedies briefly. The name "prerogative writ" connoted that "they were conceived as being intimately connected with the rights of the Crown".[137] Generally speaking, the purpose of the prerogative writs was to control the exercise of governmental duties and powers. *Certiorari* was available to quash a decision made by an inferior court, administrative tribunal or other public authority that acted in excess or abuse of its jurisdiction, or where the procedure that followed was contrary to the rules of natural justice or procedural fairness, or where there had been an error of law on the face of the record. The purpose of prohibition was to prevent the same bodies from acting or continuing to act if they were committing or about to commit the same errors that would expose them to *certiorari*. Historically, these writs were available only where the authority under challenge was performing judicial or quasi-judicial functions, but their availability was extended with the erosion of the distinction between judicial and administrative functions. The remedy of *mandamus* was available to compel the performance of a duty by a public official or public body.

While the *Judicial Review Procedure Act* had the effect of unifying the procedures used to obtain the various forms of relief formerly available pursuant to these prerogative writs, it did not address the substantive law governing them. Nor did it address the standing requirements applicable to each of them. Thus, the common law continues to determine standing in all cases.[138]

The law governing standing to obtain the relief available under the prerogative writs is complex, and has been characterized by a considerable degree of uncertainty.[139] Each of the prerogative remedies had its own standing requirements, which had developed separately, reflecting its unique origins as a separate writ. It would serve little purpose for us to attempt to examine the often difficult case law on standing. For our purposes, it is important to emphasize that, even though these remedies had a decidedly public character, insofar as they were concerned with controlling government in connection with the Crown's rights, the standing rules were generally more liberal than those applicable to other types of "public interest" proceeding, which were subject to the public nuisance rule. In the first place, the Attorney General had no control whatsoever over the right of individuals to bring proceedings. Second, in the case of *certiorari* and prohibition, the nature of the interest required of an individual differed from that required under the public nuisance rule. In *Thorson*, Laskin J. drew support for his adoption of a discretionary approach to standing

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137 *Ibid.*, at 584. Professor Evans questions the strict accuracy of the statement that "prerogative writs are writs which originally were issued only at the suit of the King but which were later made available to the subject" (*ibid.*). He argues that this assertion should be qualified, insofar as it appears that prohibition and *habeus corpus* were available to individuals at the outset.

138 See Mullan, "Reform of Judicial Review of Administrative Action—The Ontario Way" (1974), 12 Osgoode Hall L.J. 125, at 145-47, and Tokar, "Administrative Law: Locus Standi in Judicial Review Proceedings" (1984), 14 Man. L.J. 209, at 223-24.

139 See, generally, Cromwell, *supra*, note 1, at 103-20, and Evans, *supra*, note 136, at 409-21.

in constitutional challenges from "the cases in *certiorari* and prohibition which . . . have admitted standing in a mere stranger to challenge jurisdictional error".[140]

While, therefore, the uncertainty of the area of the law does not easily admit of general conclusions, it may be said that the traditional standing requirements for *certiorari* and prohibition were less stringent than those imposed on an individual by the public nuisance rule. With respect to *mandamus*, it is even more difficult to make any general comments. The law remains exceedingly complex, with various approaches to standing receiving judicial approval.[141]

Finally, it bears emphasizing that the principles governing standing to seek these remedies under the *Judicial Review Procedure Act* may have been displaced as a result of the *Finlay* decision. The Supreme Court of Canada extended the test for standing that it articulated in *Borowski* to non-constitutional challenges alleging that the bounds of statutory authority have been exceeded. While the remedies at issue were declaratory and injunctive, it has been argued that the reasoning of the court would apply equally to *certiorari*, prohibition, and *mandamus*:[142]

> With respect to remedies other than declaration and injunction, the case for applying *Finlay* is strong. The 'traditional judicial concerns about public interest standing', which the Court says are accommodated by a purposive exercise of judicial discretion, are the same for standing to seek the other remedies. The rationalia of the standing rules being the same, the logic of *Finlay* is equally applicable. . . . The main debate about whether the standing trilogy applies has been concerned with the constitutional issue versus non-constitutional issue distinction, rather than with the different standing rules for different remedies. Now that *Finlay* has clearly resolved that debate in favour of extension to cases which raise other than constitutional issues, it may be predicted with some confidence that the approach will be applied in other remedial settings.

## 6. TIMING OF THE DECISION ON STANDING

A defendant may challenge standing, by preliminary motion, through a variety of procedural mechanisms.[143] However, the Rules of Civil Procedure provide that, on the hearing of the motion, the court may "grant the relief sought or dismiss or adjourn the motion, in whole or in part with or without terms".[144]

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[140] *Supra*, note 8, at 18.

[141] See Cromwell, *supra*, note 1, at 113-18, and Evans, *supra*, note 136, at 550-53.

[142] Cromwell, *supra*, note 2, at 112-13.

[143] See, for example, Rules of Civil Procedure, O. Reg. 560/84, rr. 21.01(1)(a) and (b), and 21.01(3)(d). The procedure adopted by the moving party may determine whether evidence will be admissible on the motion. See r. 21.01(2).

[144] *Ibid.*, r. 37.13(1).

Furthermore, a judge hearing the motion may "order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge".[145] Thus, the Rules would appear to confirm that, upon the hearing of a motion challenging standing, the court has the discretion not merely to adjourn the motion,[146] but, in essence, to decline to determine the issue as a preliminary matter, and thereby defer the question to be considered with the merits of the case. Whether this discretion derives from the language of the Rules, quoted above, or from the court's inherent jurisdiction, its existence is undisputed. We turn, therefore, to consider the principles upon which the discretion is to be exercised.

In *Nova Scotia Board of Censors v. McNeil*,[147] Chief Justice Laskin discussed the desirability of considering standing together with the merits of the case, in the following terms:[148]

> [W]here . . . there is an arguable case for according standing, it is preferable to have all the issues in the case, whether going to procedural regularity or propriety or to the merits, decided at the same time. A thoroughgoing examination of the challenged statute could have a bearing in clarifying any disputed question on standing.

More recently, this question has been considered by the Supreme Court of Canada. In *Minister of Finance of Canada v. Finlay*,[149] Mr. Justice Le Dain stated as follows:[150]

> [I]n *Australian Conservation Foundation Inc. v. Commonwealth of Australia* . . . the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the

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[145] *Ibid.*, r. 37.13(2)(b). Where the trial of an issue is ordered, r. 37.13(3) provides that r. 38.11(3) applies, with necessary modifications. Rule 38.11(3) provides that "[w]here the trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge".

[146] Such an adjournment might be sought, for example, to permit the plaintiff additional time to respond to the motion. A preliminary motion to challenge standing may be brought on relatively short notice. Notice of the motion must be served "at least three days before the date on which the motion is to be heard": r. 37.07(6). Moreover, the required factum may be served on the plaintiff or applicant on the day before the hearing. See rr. 21.03 and 37.10(7).

[147] *Supra*, note 9.

[148] *Ibid.*, at 633-34.

[149] *Supra*, note 11. See, also, *Borowski v. Attorney General of Canada*, *supra*, note 97.

[150] *Supra*, note 11, at 328. Before this passage, Le Dain J. quoted the remarks of Laskin J. in *Nova Scotia Board of Censors v. McNeil*, *supra*, note 9, and observed that a similar view was expressed by the House of Lords in *I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd.*, *supra*, note 13.

> merits. The court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. . . . I agree with the view expressed in the *Australian Conservation Foundation* case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted. In my opinion the present case is one in which the question of standing can be properly determined on a motion to strike. The nature of the respondent's interest in the substantive issues raised by his action is sufficiently clearly established by the allegations and contentions in the statement of claim and the statutory and contractual provisions relied on without the need of evidence or full argument on the merits.

On the basis of the above authorities, it would appear that the court must have regard to the particular circumstances of the case in the exercise of its discretion whether to determine standing as a preliminary matter, or defer standing for consideration in conjunction with the merits. There might be obvious cases in which the issue is relatively easy to resolve at the preliminary stage. However, where the issues are such that they cannot be considered adequately in the absence of a full understanding of the specific legal and factual context, and where the materials before the court upon the preliminary motion are inadequate to establish this context clearly, the cases suggest that the question of standing should be deferred for determination with the merits of the case.

# CHAPTER 3

# DEFICIENCIES IN THE LAW AND THE CASE FOR REFORM

## 1. INTRODUCTION

In the previous chapter, we reviewed the present law of standing in Ontario. In this chapter, we shall discuss the reasons why, in our view, fundamental reform of that law is warranted. In order to place the ensuing discussion in context, it is necessary to recount the three main features of the present law.

First, until *Thorson v. Attorney General of Canada*,[1] the law of standing was dominated by the distinction between private nuisance and public nuisance. In the case of the former—an interference with the use or enjoyment of land—the individual has an unquestioned right to bring an action to seek redress. With respect to public nuisance, ordinarily only the Attorney General has the right to bring proceedings, either on his own motion or on the relation of another person, and his decision whether to consent to a relator action cannot be reviewed by the courts. The corollary of this is that an individual generally may not bring proceedings for such relief without the consent of the Attorney General. Only an individual who "can show what amounts to a sufficient private or personal interest in the subject-matter of the proceedings"[2] may institute proceedings without the consent of the Attorney General. While having their genesis in public nuisance, these principles have been applied in a variety of contexts where a "public right" or the "public interest" has been in issue.

The second important feature of the law of standing is that the so-called "public nuisance rule" does not apply to constitutional challenges to legislation, nor to certain, as yet unsettled, non-constitutional challenges to "administrative authority".[3] In these contexts, the control of the Attorney General has been rejected, and a different test must be met by prospective plaintiffs. The most notable aspect of this test is that plaintiffs need not demonstrate that there has been interference with their private rights or that they have suffered their

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[1] [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1 (subsequent references are to 43 D.L.R. (3d)).

[2] *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, at 329 (subsequent references are to 33 D.L.R. (4th)).

[3] *Ibid.*, at 339.

own special damage. In the words of *Minister of Justice of Canada v. Borowski*,[4] assuming that there is a "serious issue as to [the] invalidity [of legislation], a person need only to show . . . that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court".[5]

The third feature of the existing law in Ontario is that entirely different principles apply to standing to seek the prerogative remedies available under the *Judicial Review Procedure Act*.[6] In this context, the public nuisance rule does not prevail. Thus, the Attorney General has no control over the initiation of proceedings, and applicants need not demonstrate the type of personal interest required to be shown in order to have standing under the public nuisance rule. Not only do the standing requirements relating to the prerogative remedies generally differ from those applicable to public nuisance, but the requirements of the individual remedies differ. The law in this area has been characterized by complexity and a degree of uncertainty. In addition, with the recent decision in *Minister of Finance of Canada v. Finlay*, there is now a question whether the test for standing articulated in *Borowski* may apply to proceedings seeking prerogative remedies.

From our account of the present law, it should be apparent that the landscape of standing has altered considerably since the Commission initiated this project. With its decisions in *Borowski* and *Finlay*, the Supreme Court of Canada built on the liberalization of standing that it had begun with *Thorson*. Consequently, in the area of constitutional law—including challenges brought under section 52 of the *Canadian Charter of Rights and Freedoms*[7]—and in at least some areas of administrative law, we have seen the law of standing move generally in directions that we applaud. In these areas, the quartet has removed the control of the Attorney General over access to the courts, and has recognized that individuals without personal, pecuniary, and proprietary interests may be granted standing to raise important legal issues.

With these fundamental changes, the need for reform has, of course, been modified. Yet, there remain two general problems in the existing law. The first is that the public nuisance rule continues to prevail in some areas of the law that have been unaffected by the Supreme Court of Canada's quartet. As we stated in the previous chapter, despite legislative change,[8] the effect of the public

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[4] [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (subsequent references are to 130 D.L.R. (3d)).

[5] *Ibid.*, at 606.

[6] R.S.O. 1980, c. 224.

[7] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102. See discussion of standing under the Charter, *supra*, ch. 2, sec. 4.

[8] See, for example, *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 87(2), and *Fisheries Act*, R.S.C. 1985, c. F-14, s. 42(3).

nuisance rule is most significantly felt in the area of environmental law, where it serves to frustrate efforts by private individuals or groups to prevent or halt pollution, at a cost to the environment that is borne by us all. The second problem is that, while we obviously welcome the quartet's abandonment of the public nuisance rule in favour of a discretionary approach to standing, we have serious reservations about the manner in which the important issue of standing is resolved under the test developed by the Supreme Court of Canada. A further problem relates to the uncertainty as to the applicability of this test, even with its expansion beyond constitutional bounds in *Finlay*.

In the main, the ensuing discussion shall reflect the features of the present law that we outlined above. After discussing the public nuisance rule, we shall discuss the approach to standing taken by the Supreme Court of Canada in its quartet of cases, which applies to constitutional law and to certain challenges to administrative authority. We shall not separately consider standing in relation to the prerogative remedies available under the *Judicial Review Procedure Act*, but shall refer to it for purposes of comparison and analysis in the course of our discussion.

In proceeding through our critical analysis of the public nuisance rule and the Supreme Court of Canada's approach to standing, we shall first examine the nature and effect of the rule under discussion. Consideration will then be given to the rationalia that have been offered in support of the rule.

We shall end the chapter by stating our conclusions on the need for reform.

## 2. THE PUBLIC NUISANCE RULE

### (a) Introduction

The public nuisance rule, which we outlined above, has two aspects. First, the general rule is that actions for public nuisance or in respect of a "public right or interest" may be brought only by the Attorney General or by a relator, that is, a person to whom the Attorney General has given his consent. The second aspect of the rule may be regarded as an exception to the general principle: notwithstanding the public nature of the wrong, a private individual who can show the requisite private or personal interest has standing without the consent of the Attorney General.

The public nuisance rule is premised on the traditional perception that the world of litigation can be neatly bifurcated into two compartments, reflecting the distinct existence of "public rights" and "private rights". According to this view, the Attorney General is responsible for the vindication of "the public interest" and "public rights", and individuals are responsible for asserting "private rights". Declaratory or injunctive relief relating to a public nuisance or "public rights" may be sought by an individual only where his claim is cast in a "private" mould.

Since our criticisms with respect to the two facets of the public nuisance rule differ somewhat, we shall consider them separately.

### (b) Control by the Attorney General

#### (i) Philosophical Rationale

The basic philosophical rationale for the Attorney General's control, which we have inherited from England, is that the Attorney General is the sole guardian of "the public interest" and "public rights". Since he is the guardian on behalf of the public, a private individual has no role to play in proceedings to vindicate the "public interest" or "public rights". Nor do courts have the right to review or question the discharge of the Attorney General's responsibility. If the Attorney General is to be answerable for the exercise of this power, it is to be in the Legislature.

The effect of the rule is to confer on the Attorney General absolute power to control access to the courts, except where a person has a personal interest of the kind accepted by the courts to grant him standing to bring his own private action. As a matter of principle, we are of the view that access to the courts should not be so confined. We reject the notion of a rigid dichotomy between public and private rights, with the former being the exclusive preserve of the Attorney General.

We believe that, while the emergence of this perception of the role of the Attorney General may be understandable as a historical phenomenon—in particular, reflecting the criminal law origins of public nuisance[9]—it should no longer be controlling. The role of the Attorney General in England has varied over the centuries,[10] and although his responsibility as guardian of public rights has been generally accepted, by no means are the authorities unanimous as to his exclusive right to bring proceedings in the public interest.[11] It is important to recall that the early public nuisance cases involved relatively minor interferences, such as obstructing a public highway or blocking the passage of vessels in a river, and it is in this context that the governing principles were articulated. Today, the nature and extent of harm that may constitute a public nuisance might conceivably be of an entirely different order—for example, threatening the destruction of fish in a lake or the pollution of a water supply. The consequences for the public of a failure of the Attorney General to act, whether by bringing proceedings or consenting to a relator action, are potentially much more serious today than in the era when these principles were first developed.

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9 See ch. 2, sec. 2(c).

10 See, generally, Edwards, *The Law Officers of the Crown* (1964), and *The Attorney General, Politics and the Public Interest* (1984).

11 In *Wilkes v. The King* (1768), Wilm. 322, 97 E.R. 123, at 125 (H.L.), Chief Justice Wilmot, in a judgment to which all of the Justices present assented, concluded as follows:

Moreover, we question the accuracy of the assertion that "the Attorney General is the guardian of the public interest"—a statement said to be virtually constitutional in nature.[12] Like the Law Reform Commission of Australia,[13] we consider that this statement is significantly undermined by the fact that the Attorney General has no control over individuals seeking prerogative remedies, even though the practical consequences of a successful application for judicial review would resemble those of a declaration or an injunction. We suggest that the state of the present law indicates that the Attorney General has in fact been seen as the guardian of the public interest only insofar as declarations or injunctions are concerned, but not generally.[14]

On a more fundamental level, we question the validity of the notion that any one person, whether the Attorney General or any other public official, can be said to represent "the public interest". The concept that there is a public interest to be represented or defended, and of which the Attorney General is the

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> The arguing that the Attorney General only, and no other officer, was entrusted by the constitution to sue for the King, either civilly or criminally, is a fundamental mistake. The Attorney General is entrusted by the King, and not by the constitution; it is the King who is entrusted by the constitution.
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> The great abilities of the persons appointed to this office have made it figure high in the imagination, and annexed ideas to it which do not belong to it; for he is but an attorney, though to the King, and in no other or different relation to him than every other attorney is to his employer; and it is by degrees that he hath attained to that rank which he now holds in the law.

[12] In *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, at 477 and 481, [1977] 3 All E.R. 70 (H.L.), Lord Wilberforce stated as follows:

> It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown.
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> • • •
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> That it is the exclusive right of the Attorney-General to represent the public interest—even where individuals might be interested in a larger view of the matter—is not technical, not procedural, not fictional. It is constitutional. I agree with Lord Westbury, L.C. that it is also wise.

[13] Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985) (hereinafter referred to as "Australian Report").

[14] *Ibid.*, para. 156, at 85-86, and para. 169, at 97. In his criticism of *Gouriet*, Professor Wade, stated as follows:

> But this [that is, the more liberal standing rules for the prerogative remedies] makes it all the more surprising to be told that it is a fundamental principle that only the Attorney-General can represent the rights of the public. This is true only as against defendants, such as trade unions, which are not public authorities and which are not therefore within the scope of the prerogative remedies.

Wade, "The Attorney-General and the Trade Union" (1978), 94 Law Q. Rev. 4, at 8.

guardian, implies that there is a single, monolithic public interest. However, we do not accept that there is such a public interest today in Ontario, a society characterized by diversity and pluralism, if indeed it could be said that a unitary public interest ever did exist in Ontario in an earlier, simpler era.

Rather than there being a single public interest, it is obvious that major issues often attract competing visions of the public interest, offered by different "publics", each with its own needs, perceptions, and interests. Making a particular decision "in the public interest" does not simply involve finding something called the public interest and applying it to a problem; it often requires developing a solution out of a complex web of conflicting, perhaps irreconcilable, interests.[15] This is particularly evident in the proceedings of regulatory tribunals, which seek to ensure that decisions are made in the public interest by encouraging widespread participation of interested parties and intervenors.[16]

That the existence of a single "public interest" is a fiction, in our view, fatally weakens the theoretical underpinnings supporting the Attorney General's exclusive control over litigation seeking injunctive or declaratory relief in the case of public nuisance and public rights. Essentially, this means that the Attorney General's decision whether to bring proceedings or to allow a relator to do so, while formally clothed in the impressive mantle of "the public interest", is but a single, albeit important, view of the public interest, reflective of the perceptions of the Attorney General, his Ministry, or the provincial Cabinet.

A major criticism of the existing law,[17] with which we entirely agree, concerns the danger that the exercise of this power may be influenced by partisan or improper political motives. In theory, the decision to initiate proceedings or consent to a relator action is to be discharged objectively in the public interest, entirely divorced from such considerations. However, in Ontario, and elsewhere in Canada, the Attorney General is a member of Cabinet in a parliamentary system of government, in which collective cabinet responsibility is a fundamental tenet. As such, the office has its obvious political dimensions, which cannot be disregarded.[18] At the very least, the Attorney General's dual role as the

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[15] For similar arguments, see Cromwell, *Locus Standi*[:] *A Commentary on the Law of Standing in Canada* (1986), at 185-86; Australian Report, *supra*, note 13, para. 159, at 88; and Craig, *Administrative Law* (1983), at 433.

[16] See Roman, "Locus Standi: A Cure in Search of a Disease", in Swaigen (ed.), *Environmental Rights in Canada* (1981) 11, at 34-36.

[17] See Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, LRC 46 (1980) (hereinafter referred to as "British Columbia Report"), at 56-59, and Roman, *supra*, note 16, at 17. See, also, Australian Report, *supra*, note 13, para. 163, at 92.

[18] In a letter to the editor of *The Times* (London, August 3, 1977), at 15, during the public controversy about the *Gouriet* decision, Lord Shawcross, a former Attorney General, stated as follows:

> Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there, which is the party to which the Attorney-General of

Crown's chief law officer and member of the government involves the appearance of a conflict of interest. In a sense, the present law places the Attorney General in an invidious position: regardless of his decision with respect to particular proceedings, there will be a suspicion in some quarters that the determination will have been made with at least some view to political advantage. Whatever the actual reasons, the motives of the Attorney General may well be impugned. That he does not need to offer reasons for his decision, and may choose not to do so, exacerbates his dilemma.[19] Even in England, where the Attorney General is not a member of the Cabinet, the existing control of the Attorney General has been criticized on this basis.[20]

As we have indicated, the theory of the existing law is that the Attorney General will be answerable to the Legislature and, ultimately, the electorate, for the exercise of this authority. However, there are factors that may conspire to make that accountability ineffective, if not illusory. The most important of these is that the Attorney General is a member of the Cabinet. Although the Attorney General's conduct may be questioned in the Legislature, no sanction can be applied where his party forms a majority government and supports his decision.[21] Even where there is a minority government, the complexity, specificity, and the sensitivity of the issues involved make them difficult material for the opposition parties to use against the government in the Legislature. We doubt, moreover, whether decisions about individual actions are the stuff of which elections are made. Finally, even in the unlikely event that the political process is engaged and centres on a decision of the Attorney General in a particular proceeding, there is a question whether the parliamentary process, accustomed to dealing with broad and sweeping policy issues, is well-equipped to deal with the details of individual cases, even where matters of general interest are involved.

The problems of real and perceived conflict of interest and the fallibility of relying on the accountability to the Legislature as an assurance of proper

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> the day must belong . . . . [T]hat party will obviously not criticise the Attorney-General of the day for not taking action which, if taken, might cause embarrassment to their political supporters . . . .
>
> It is naive to observe, as was done in the Gouriet case, that the Attorney General may have regard to political considerations but 'not of course acting for party political reasons'. It is 'of course' exactly the present appearance and the future possibility that he might so act which endangers both existing respect for and the future effectiveness of the rule of law, already sadly eroded in many fields.

This excerpt is quoted in McMurtry, "The Office of the Attorney General", in Mendes da Costa (ed.), *The Cambridge Lectures*, (1979) 1, at 5.

[19] See British Columbia Report, *supra*, note 17, at 57 and 61.

[20] See, for example, Craig, *supra*, note 15, at 433, and Wade, *supra*, note 14, at 7.

[21] See Hartley, "Gouriet: The Constitutional Issue" (1978), 41 Mod. L. Rev. 58, at 62; Australian Report, *supra*, note 13, para. 164, at 93-94; and Cromwell, *supra*, note 15, at 189-90.

conduct are exacerbated where the proceedings in issue are brought against the government. It should be obvious that, in such a case, the Attorney General will be in an acute conflict of interest situation. In these circumstances, the effect of the public nuisance rule is that the Attorney General is both the only person entitled to challenge the impugned practice or legislation and the person whose duty it is to defend it. Consequently, the public nuisance rule gives the Attorney General an absolute authority, in the words of Laskin J. in *Thorson*, to "immunize"[22] the prospective defendant from judicial scrutiny.

By virtue of the *Thorson* case and its progeny—in particular, *Finlay*—in Canada it has been accepted that it is improper for the Attorney General to exercise this control in challenges having a constitutional basis and in certain challenges relating to "the limits of administrative authority".[23] However, the bounds and applicability of the *Finlay* decision are as yet uncertain.[24] To the extent that any area of the law in which the government may be a defendant may continue to be subject to the public nuisance rule, the existing law continues to be seriously wanting. In our view, the court's concern to ensure access to the judicial system, stated in *Thorson*, which was expressly accepted in *Finlay* as the basis for extending *Thorson* to challenges relating to "administrative authority", should apply generally to any litigation in which the government is a defendant.

Finally, if further support be needed for our criticisms of the control of the Attorney General where the government is the defendant, we wish to return to the prerogative remedies. Under the *Judicial Review Procedure Act*, a private individual may seek "an order in the nature of mandamus, prohibition or certiorari".[25] As we have indicated, the Attorney General has no control over proceedings for any of these remedies. Yet the effect of a successful application on a government defendant is essentially the same as an injunction or declaration. We agree entirely with the following observation of Professor Cromwell:[26]

> It is hard to understand why, as a matter of principle, one should need the Attorney General's *fiat* to seek a declaration that a regulation is *ultra vires*, but not to seek *certiorari* to quash a decision founded on it.

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22 In *Thorson v. Attorney General of Canada*, *supra*, note 1, at 7, Laskin J. commented that "[a] more telling consideration for me [stated in counterpoise to the argument that allowing standing would lead to 'grave inconvenience and public disorder'], is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute".

23 *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 339.

24 See discussion *infra*, this ch., sec. 3.

25 *Supra*, note 6, s. 2(1).

26 Cromwell, "From Trilogy to Quartet: *Minister of Finance of Canada v. Finlay*" (1987), 7 Windsor Y.B. Access Just. 103, at 117. With respect to the existing law, which regards the Attorney General as a necessary and proper filter in one context, but unnecessary in another, Craig, *supra*, note 15, at 432, states that "[t]he spectre is raised of the outcome of a case being made dependent upon forms of action redolent of the technicalities which plagued nineteenth century procedure".

Our conclusion, then, is that the philosophical justification for the rule giving the Attorney General exclusive, unreviewable control over access to the courts both in public nuisance cases and in litigation invoking "public rights" and "the public interest" is insupportable. While we do not doubt that the views of the Attorney General respecting what constitutes the public interest are important and should be given considerable weight, the Attorney General should not be regarded as the exclusive guardian of that interest.

### (ii) Functional Rationalia

We have thus far considered the philosophical basis for the rule giving the Attorney General control over access to the courts in public nuisance litigation and proceedings seeking to vindicate the public interest. This rule has also been supported by certain functional rationalia, which justify this control on the ground that it serves certain important societal objectives.

#### *a. The "Floodgates" Rationale*

The first rationale that we shall consider is that, in the absence of a personal interest that would be sufficient to allow the plaintiff to bring his own private action, control by the Attorney General is necessary to avoid what would otherwise be a "flood" of proceedings. This "floodgates" or "multiplicity of proceedings" rationale seems to consist of two different, although related, contentions. The first is that removing barriers to litigation will lead to an enormous increase in the volume of claims generally, increasing the burden on the court system. The second argument is that there will be multiple proceedings relating to the same conduct of an individual defendant.

With respect to the contention that removal of the Attorney General's control would lead to a massive increase in the volume of proceedings, we observe that arguments of this nature are almost invariably presented in opposition to proposed changes that will improve access by individuals to the courts, whether by creating or enlarging substantive rights, or by removing procedural barriers. Two famous examples, in which these arguments did not prevail, are *Donoghue v. Stevenson*[27] and *Dyson v. Attorney-General*.[28]

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[27] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.) (subsequent references are to [1932] All E.R. Rep.). See the dissenting speeches of Lord Buckmaster (*ibid.*, at 10) and Lord Tomlin (*ibid.*, at 20).

[28] [1911] 1 K.B. 410 (C.A.). On behalf of the Attorney General, it had been argued that "there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers": *ibid.*, at 423. Lord Justice Farwell responded as follows (*ibid.*):

> [I]f inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials . . . .

This type of floodgates argument has been generally discounted in the debate about standing, however much it may remain part of the historical background of the public nuisance rule. Most significantly, the Supreme Court of Canada refused to accept its validity in *Thorson*.[29] Its rejection of the floodgates rationale appears to have been confirmed in *Finlay*, where the court summarized "[t]he traditional concerns about the expansion of public interest standing".[30] No specific mention was made of the floodgates argument.

Support for Mr. Justice Laskin's dismissal of this argument may also be found in the fact that the expansion of standing as a result of *Thorson* and its progeny did not give rise to an inordinate increase in litigation. Nor are we aware of any allegations that the less stringent requirements for standing to seek the prerogative remedies—most notably, the absence of control by the Attorney General—has led to a flood of applications for judicial review.

In their respective reports on standing, both the Law Reform Commission of British Columbia and the Australian Law Reform Commission rejected the floodgates argument.[31] Both rightly stated that the argument implicitly assumes that individuals are anxious to litigate when, in fact, the reverse is true.[32] For a variety of reasons, most individuals do not find the prospect of litigation enticing. Not the least of these is the attendant expense. As we shall explain in chapter 6,[33] the existing costs rules constitute a formidable deterrent to commencing litigation, especially where an individual lacks any personal financial interest in the outcome. Even with the costs changes that we shall recommend, not all of the economic disincentives to litigation will be removed. Moreover, aside from the cost, litigation presents the spectre of a lengthy, arduous ordeal, with an outcome that is uncertain. Consequently, it is suggested that there is a strong impulse for individuals to avoid legal action.[34]

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29 *Supra*, note 1, at 6-7.

30 *Supra*, note 2, at 340. But see Cromwell, *supra*, note 26, at 111, who seems to argue that the court's acceptance of "[t]he concern about the allocation of scarce judicial resources and the need to screen out the mere busybody" reflected a concern about multiplicity of actions.

31 See British Columbia Report, *supra*, note 17, at 59, and Australian Report, *supra*, note 13, paras. 197-206, at 110-13.

32 In this regard, Professor Scott has commented:

> The idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, but not the courtroom.

Scott, "Standing in the Supreme Court—A Functional Analysis" (1973), 86 Harv. L. Rev. 645, at 674.

33 See *infra*, ch. 6, sec. 2.

34 See, generally, Merry and Silbey, "What Do Plaintiffs Want? Reexamining the Concept of Dispute" (1984), 9 Just. Sys. J. 151. By contrast, corporations and government are likely more capable of coping with the strains of litigation because their repeated involvement has moved them to institutionalize their responses: see Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974), 9 Law & Soc. Rev. 95.

Before turning to the second floodgates argument, there is a final point that we wish to make about the concern that removing the Attorney General's control, or indeed any other liberalization of the standing rules, will lead to a flood of claims. When this argument is raised, there is an assumption, which is frequently implicit, that the types of claim that can now be advanced in the courts are necessarily to be preferred to the "new" claims, which constitute the threatened flood.[35] However, this is an assumption that the Commission does not accept. Our court system is a valuable and finite resource that is subsidized by the public. Deciding who is entitled to the benefit of this subsidy, and to use this important resource, is a critical policy issue. It is by no means self-evident that the present consumers deserve access to the courts any more than the persons having claims that the law does not now recognize.

With respect to the argument that removal of standing barriers will lead to multiple proceedings relating to the same conduct of the defendant, we believe that this apprehension is exaggerated. We recognize that abolishing the Attorney General's control over the initiation of proceedings or, as we shall later discuss, removing the need to show a special personal interest as a standing requirement for individuals, will involve a greater potential for proceedings being brought against a defendant by more than one plaintiff. However, this is a problem that is encountered whenever a defendant acts in a manner that has an impact extending beyond a single person. The courts already have authority under the *Courts of Justice Act, 1984*[36] and the Rules of Civil Procedure[37] to deal with multiple proceedings: for example, consolidation[38] or a stay of proceedings[39] may be ordered to avoid the problem. Where the relief sought is declaratory or injunctive, a class action may be brought.[40]

Furthermore, we consider that, in many cases, the "danger" of multiple proceedings against a single defendant may be only theoretical. Where the remedy sought is a declaration or an injunction, once a proceeding has been commenced, little practical purpose would be served by initiating a parallel action. A prospective plaintiff could always attempt to intervene in the initial proceedings if she were concerned about presenting a particular argument.[41] Multiple proceedings, therefore, would be very unlikely, especially in view of the general reluctance of individuals to become involved in litigation. Moreover, if a concurrent action were brought, in certain circumstances it could be dismissed as

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[35] See Roman, *supra*, note 16, at 24-25, and Bogart, "Standing and the Charter: Rights and Identity", in Sharpe (ed.), *Charter Litigation* (1986) 1, at 5-6.

[36] S.O. 1984, c. 11.

[37] O. Reg. 560/84.

[38] *Ibid.*, R. 6.

[39] *Courts of Justice Act, 1984*, *supra*, note 36, s. 119, and Rules of Civil Procedure, *supra*, note 37, r. 21.01(3).

[40] *Ibid.*, R. 12.

[41] *Ibid.*, R. 13. For a discussion of intervention, see *infra*, ch. 5.

frivolous or vexatious or an abuse of process under the existing Rules.[42] Even if proceedings for a declaration or injunction were unsuccessful, the problem of subsequent actions would be addressed by the operation of the doctrine of *stare decisis*.[43]

Having regard to the foregoing, the possibility of multiple litigation cannot be accepted as a basis for continuing the control of the Attorney General over proceedings. Moreover, where the Attorney General's control does not exist—in constitutional, and certain administrative, litigation and in applications for judicial review—we have seen no evidence that this particular mischief has materialized.[44] This problem should be left to the courts, and, in the following chapter, where we present our proposals for reform, we make this view manifest by a specific recommendation.[45]

### *b. Political Considerations*

The final two rationalia for the Attorney General's control over "public interest litigation" relate to the alleged need, in the public interest, to remove certain types of dispute from the courts.[46] The first rationale is that "the very existence of legal proceedings may be contrary to the public interest"[47] because it may exacerbate a conflict that has wider ramifications than its effect on the immediate parties. Accordingly, it is argued, "there ought to be control by a politically responsible person such as the Attorney General, who can not only assess the strict legal position of the parties as could the courts, but may also take account of a broader view such as the possibility of political compromise and prevention of escalation of the dispute outside the legal arena".[48]

The second rationale is that the issues raised in the proceedings, while otherwise justiciable, involve broader implications that make it more appropriate for them to be resolved by the political process. As an example of a situation that might be used to support this argument, the following has been suggested:[49]

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[42] Rules of Civil Procedure, *supra*, note 37, r. 21.01(3)(d). See, also, *ibid.*, r. 25.11.

[43] We note that Mr. Thorson abandoned his action after another plaintiff who had brought a similar action was unsuccessful: see *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, (1974), 45 D.L.R. (3d) 583.

[44] For similar arguments, see British Columbia Report, *supra*, note 17, at 60, and Australian Report, *supra*, note 13, paras. 201-06, at 112-13.

[45] See *infra*, ch. 4, sec. 3(b)(iii)b(4).

[46] See, generally, Cromwell, *supra*, note 15, at 180-91.

[47] *Ibid.*, at 180.

[48] *Ibid.*

[49] *Ibid.*, at 181.

> If a factory, which is the largest employer in a community, is also the largest polluter in the area, a judicial decision about the existence of a nuisance and the imposition of a remedy open to the Court might risk giving insufficient weight to the economic hardship that would fall upon the community in the event the factory closed as a result of the Court's decision. A more satisfactory decision might be possible through political rather than judicial channels. Accordingly, the argument could go that a politically responsible law officer such as the Attorney General should be able to decide which route the dispute will follow.

It should be appreciated that both of these justifications are undermined where the particular factual circumstances would allow an individual to bring proceedings on her own. If, for example, the pollution activity mentioned above were to damage a single adjacent parcel of land, the landowner would have an action in private nuisance, and whether the remedy sought by her would cause economic hardship to the community would be irrelevant to her right to ask for relief. It would be similarly irrelevant if a person were otherwise affected such that she had a sufficient personal interest to have standing. In either case, the Attorney General would have no authority to remove the proceedings from the court.

Thus, the validity of these justifications, to a great extent, depends on the defensibility of the existing law in deciding when the Attorney General's control is to be exercisable. As we shall explain, we consider the distinctions drawn in the present law, on which the control of the Attorney General is premised, completely insupportable. We should add that, where proceedings involve constitutional or certain administrative challenges, or applications for judicial review, the concerns addressed by these rationalia have no bearing on the right of an individual to bring the disputes before the courts.

Turning to our criticisms of the two preceding rationalia, we are of the view that neither of them supports the Attorney General retaining control over access to the courts. We turn first to the justification that such control is warranted to ensure that certain questions are resolved through the political process, rather than by the courts.

Generally, the question whether disputes are appropriate for judicial determination is left to the courts. In the United States, there is considerable jurisprudence and much commentary about this aspect of justiciability and the related doctrine of "political questions",[50] which seek to elucidate the principles that determine when a question is beyond the constitutional competence of courts, as opposed to being simply complex and controversial. In Canada, until recently, the concept of justiciability has been largely absent from the jurisprudence. In 1985, in *Operation Dismantle Inc. v. The Queen*,[51] the Supreme Court of Canada considered a challenge to the federal government's decision to allow cruise

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[50] See discussion in Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988), 10 Supreme Ct. L. Rev. 377, at 389.

[51] [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481. For commentary, see Fairley, "Developments in Constitutional Law: The 1984-85 Term" (1986), 8 Supreme Ct. L. Rev. 53, at 82-90.

missile testing in Canadian airspace, in the course of which Madame Justice Wilson addressed the question of justiciability. According to the Supreme Court of Canada in *Finlay*, the court in *Operation Dismantle* accepted that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government".[52]

Undoubtedly, the matter of justiciability is a complex and controversial question of public importance. However, what is important to us here is that courts are trusted to decide what is justiciable, even in the context of a case like *Operation Dismantle*, which related to the Crown's prerogative powers respecting the conduct of foreign affairs and national defence. In effect, the only context in which courts are not trusted with this responsibility is where, under the public nuisance rule, the Attorney General interposes himself between the litigant and the court, denies his consent to a relator action, and thereby prevents the court from deciding justiciability. Leaving aside the question whether there is a danger that the Attorney General might exercise this power improperly, we are of the view that the question whether issues raised in litigation are inappropriate for judicial determination should be left to be decided by the courts themselves.

We are buttressed in this view by the fact that the enactment of the *Canadian Charter of Rights and Freedoms* has irrevocably changed the role of courts in Canada, expressly empowering them to examine government policy in connection with the protection of fundamental rights and freedoms. Against this background, we reject the view that the Attorney General's control over "public interest" litigation can be supported by a concern for justiciability. In this regard, we agree with Professor Cromwell's comments:[53]

> Canadian courts are charged with deciding the limits of the powers of Parliament and the Legislatures. More recently, this role has been expanded to include ruling on whether the elected law-makers have acted consistently with certain fundamental rights and freedoms. Decisions respecting legislative authority and fundamental rights involve the Canadian courts obviously and openly in considering matters of social policy and the public interest. It seems somewhat incongruous to entrust to the Canadian courts questions of this sort, and yet to assume that the unreviewable discretion of the Attorney General is needed to prevent them from acting in inappropriate cases. If the courts are worthy of the other tasks entrusted to them, they can be trusted to decline to interfere where action based on a politically responsible view of the public interest is preferable to judicial adjudication.

With respect to the argument that the Attorney General's control is justified where permitting the dispute to be the subject of the legal proceedings would be

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[52] *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 340.

[53] Cromwell, *supra*, note 15, at 188. See, also, Mullan and Roman, "*Minister of Justice v. Borowski*: The Extent of the Citizen's Right to Litigate the Lawfulness of Government Action" (1984), 4 Windsor Y.B. Access Just. 303, at 337.

contrary to the public interest, we consider that, in some cases, this may be a legitimate concern. However, this concern does not justify allowing the Attorney General an absolute, unreviewable discretion to decide the matter. While we recognize that this may be a legitimate concern where, for example, the prosecutorial discretion of the Attorney General is implicated, we have concluded that, against the background of the Charter and its impact on the role of the courts, this matter should be left to the sound judgment of the courts, rather than the Attorney General, whose control unquestionably entails the dual risk of conflict of interest and abuse.

### (c) Individual Standing

In chapter 2,[54] we explained that an individual may bring proceedings without the consent of the Attorney General in connection with public nuisance or "public rights" where he can show interference with his "private right" or "special damage peculiar to himself".[55] While this part of the public nuisance rule defines the circumstances in which an individual may seek to vindicate the public interest or to enjoin a public nuisance, it is important to realize that this exception to the Attorney General's absolute control is not rooted in a judicial perception that certain individuals should be entitled to litigate in the public interest. Rather, it is a recognition that the conduct in question also implicated what the *Finlay* court called "a sufficient private or personal interest",[56] for which the individuals affected should be entitled to seek redress. In its origins, this development was a liberalizing measure, for it created a new private right of action for "public" nuisances, that is, nuisances affecting interests other than land.[57] What, in the sixteenth century, was an historically understandable judicial response to the fact that public nuisance was a crime became the exclusive basis on which individuals could bring civil actions for public nuisance and, eventually, actions respecting other public rights.

We have two basic criticisms of the rule governing individual standing. The first is fundamental: we are of the view that the necessity of a private or personal interest[58] is wrong in principle, and should be abandoned. Requiring an individual to show such an interest places access to the courts on altogether too narrow a basis, and prevents important, justiciable issues from being heard.

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[54] *Supra*, ch. 2, sec. 2.

[55] *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109, at 114, (1902), 72 L.J. Ch. 28.

[56] *Supra*, note 2, at 329.

[57] For an interference with the use or enjoyment of land, private nuisance was available.

[58] See, for example, *Rosenberg v. Grand River Conservation Authority* (1976), 12 O.R. (2d) 496, at 505, 69 D.L.R. (3d) 384 (C.A.), where Arnup J.A. stated that "a very long line of cases, binding on this Court, have held that the 'interest' referred to must be pecuniary or proprietary in nature".

In essence, the public nuisance rule constitutes a judicial policy that the only interests that deserve recognition for the purpose of determining standing for private individuals are those that are personal, pecuniary or proprietary in nature. This policy has so long been a feature of the law, mirroring the courts' formalistic demarcation of the world into rigid "public" and "private" spheres, that it has effectively prevented courts from considering the fundamental question that lies at the heart of the standing issue. The basic question underlying standing concerns what rights or interests the law should protect or recognize by allowing persons who invoke them to seek redress in the courts.[59] In effect, the answer given by the public nuisance rule is that, for private individuals, only personal, pecuniary or proprietary interests—what we shall call "traditional legal interests"—warrant protection. We consider that, however satisfactory that answer may have been in the past, it is not an appropriate response today.

In the modern world, people may be affected by conduct of the government and other persons or entities that is capable of having widespread effect, but does not necessarily have an impact on a traditional legal interest. Consequences may be generalized and diffuse, affecting the entire populace, or a major segment of it. While an individual may be objectively affected in some way, she may not be aggrieved in any traditional sense. Rather than ask whether the interests implicated by such action deserve recognition, the public nuisance rule essentially asks whether an individual has a private right of action, which inevitably leads to a negative response. As a result, the larger issue is avoided entirely.[60]

The problem is that the existing law asks the wrong question and, as a result, elicits the wrong answer. The person whose standing is challenged may not, in fact, be seeking to vindicate a private or personal interest, regardless of how she must cast "her" particular interest under the present rule in order to be allowed to proceed; in reality, she may be claiming that the non-traditional legal interest that she is asserting entitles her to enter the courtroom. Asking her whether she possesses a private or personal interest is beside the point.

For the private individual, the public nuisance rule disregards the undifferentiated effects of conduct that simply cannot be said to affect a traditional legal interest. In so doing, it categorically settles, without considering, the issue whether these non-traditional interests deserve recognition where they are advanced by someone other than the Attorney General. We believe that this question, lying at the core of standing, is the very issue that should be examined by courts. The present approach, rooted "[i]n a world dedicated to providing a framework for individual ordering",[61] does not respond adequately to contemporary

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[59] See, generally, Vining, *Legal Identity*[:] *The Coming of Age of Public Law* (1978). See, also, Cromwell, *supra*, note 15, at 90-91, and Bogart, *supra*, note 35.

[60] See, for example, Craig, *supra*, note 15, at 445, who criticizes the courts' "unthinking adoption of rules from private causes of action into the realm of challenges against public bodies". See, also, Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief" (1974), 83 Yale L.J. 425.

[61] Bogart, *supra*, note 35, at 2-3.

needs. As a consequence, certain important issues may be insulated from the courts:[62]

> [N]ew values have developed which people feel are worthy of protection but which cannot be accommodated by the traditional restrictive standing criteria. Broader social, economic, religious and non-economic values outside established property criteria are justly prized and protection sought against their infringement. Traditional legal rights in such values do not exist; no established cause of action arises if they are infringed, and thus if standing were limited to situations in which such a cause of action arose no person could invoke the protection of the court.

We draw support for our views from the fact that a traditional legal interest is not a prerequisite for standing in other contexts in which challenged conduct may have a similarly generalized effect. As we have said, such a requirement is not a feature of the prerogative remedies, which are available on a much broader basis.[63] In Canada, moreover, the necessity for a private or personal interest has been expressly rejected by the Supreme Court of Canada in challenges with a constitutional basis and certain, as yet unsettled, administrative law challenges. Significantly, in *Thorson*, one reason for the court's decision was that the application of the public nuisance rule would prevent an important constitutional issue from being made the subject of adjudication,[64] for no person could claim to be affected in a way different from the way in which general public was affected. The reasons in the *Thorson* case, it will be recalled, were accepted by the Supreme Court of Canada in *Finlay*. Thus, in Canada we have seen at least a partial acceptance that the requirement of a traditional legal interest is inappropriate where the conduct in question has a generalized, undifferentiated impact on the populace.

Leaving aside our fundamental objection to the public nuisance rule's requirements for individual standing, we turn to our second criticism, which focuses on the interpretation of the rule and its operation in practice. Under the rule, a person must show either interference with a private right or the existence of special damage peculiar to himself. While personal injury or property damage will constitute "special damage",[65] the meaning of the "special damage"

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[62] Craig, *supra*, note 15, at 446.

[63] With respect to the prerogative remedies, Craig, *ibid.*, at 431 (emphasis in original), observed:

> The applicant is *not* tied to the enforcement of private law rights; he *is* in effect vindicating the public interest subject to a judicial discretion to preclude the phantom busybody or ghostly intermeddler. If this is so then the statement underpinning *Gouriet*, to the effect that individuals enforce private rights and the Attorney-General enforces public rights, cannot be unqualifiedly accepted.

See, also, Wade, *supra*, note 14, at 7-9.

[64] *Supra*, note 1, at 7.

[65] Cromwell, *supra*, note 15, at 24, stated that "[i]t appears to be settled that personal injury or property damage suffered by the plaintiff will always qualify as special damage regardless of the number of pesons who suffer similar losses".

requirement otherwise remains, to a large degree, uncertain. Controversy centres on the question whether the plaintiff's injury must be different in kind from that suffered by the general public or merely different in degree. To the extent that the law demands a difference in kind, which seems to be the more widely accepted view,[66] the distinction between a difference in kind and a difference in degree assumes crucial importance. This distinction, however, is unduly technical and extremely difficult to apply in practice. Moreover, it bears no relation to the rationalia that have been cited in support of the requirement that a plaintiff show interference with a private right or infliction of special damage.

Our criticism of the kind-degree distinction does not arise simply from a concern for the conceptual purity of legal doctrine. Uncertainty involves costs, for it invites litigation, which may lead to the further delay and expense attendant upon appeals. More importantly, whether the courts require a difference in kind or a difference in degree, the practical result may be to deny a remedy to claimants who undoubtedly have suffered certain types of loss. The potential harshness, in particular, of the difference in kind test is well illustrated by the fishing cases that we discussed in chapter 2.[67] In a sense, then, the interpretation given to the rule for individual standing may frustrate the purpose for which the courts accepted an exception to the Attorney General's control, namely, to afford a means of civil redress to persons who have suffered injuries arising from a public nuisance.

It is important to emphasize that the difficulties of the special damage requirement are not confined to actions for public nuisance, but extend to all areas of the law where the public nuisance rule continues to apply. In the following passage, the significance of the problem is well articulated:[68]

> The courts have shown a tendency to adopt a narrow and technical approach to the resolution of this question [that is, the question of what constitutes special or peculiar damage], and have often ignored the historical and purposive aspects of the rule that they are attempting to define. The law of standing in public nuisance depends on a distinction that is frequently difficult or impossible to draw and has been refined until it has become absurdly technical. It would be simply unfortunate if the reach of these weaknesses were confined to public nuisance. However, the difficulty is much greater as the rules about standing in public nuisance have been influential in the law of standing generally. The wholesale adoption of the public nuisance standing principles, which are far from satisfactory even in the substantive area in which they arose, is a major impediment to the development of a rational modern law of standing.

In Canada, the uncertainty of that part of the public nuisance rule governing standing by private individuals has been increased by the *Finlay* decision.

[66] Cromwell, *supra*, note 15, at 25, noted "that the narrower formulation has received appellate approval in both Ontario and New Brunswick and that it has been approved in *dicta* in the Supreme Court of Canada".

[67] *Supra*, ch. 2, sec. 2(d). See discussion of the special damage requirement in Cromwell, *supra*, note 15, at 24-27.

[68] *Ibid.*, at 27.

As we explained in the previous chapter, the Supreme Court interpreted the requirement of "a sufficient private or personal interest in the subject-matter of the proceedings".[69] In so doing, the court in effect added a new dimension to the traditional test for individual standing to bring proceedings respecting a public right or interest. Expressly borrowing the "nexus" requirement of the United States Supreme Court standing jurisprudence, LeDain J. stated that "a similar requirement of directness or causal relationship between the alleged prejudice or grievance and the challenged action is implicit in the notions of interference with private right and special damage".[70]

We regard the introduction of the nexus requirement, with the American case law that would possibly follow in its train, as an unfortunate development. This aspect of the *Finlay* case has been criticized by Professor Bogart in the following passage, with which we agree:[71]

> [T]he concept of causation or nexus . . . adds yet another construct to the process of determining standing. This construct is open to endless manipulations disguising the real reasons for accepting or rejecting the plaintiff's claim to sue. Consider tort law and its use of causation. Saying something 'directly caused' something else is a conclusion that masks the complexity and interrelationship of factors that ultimately produce a particular 'effect'. . . . Thus, 'nexus' and 'causation' can be summoned to deny or confer entitlement to sue without a searching examination of why a court should embrace or reject the issues presented in the case in which standing is challenged, while seeming to provide a more conceptually intricate approach to the issues.

The American experience with this concept supports this criticism and suggests that little useful guidance will be available to assist Canadian courts.[72]

Having stated our criticisms of the requirement of "a sufficient private or personal interest", it remains to consider the rationalia that have been offered in support of this prerequisite.

### (i) Rationalia

#### *a. Floodgates*

In this context, we find the familiar "floodgates" justification: requiring an individualized private or personal interest is necessary to prevent an increase in

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[69] *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 329.

[70] *Ibid.*, at 333.

[71] Bogart, *supra*, note 50, at 384-85. See, also, Cromwell, *supra*, note 26, at 108, who argued that "[c]ausation is another vague term, capable of bearing many different meanings and being used as a conclusion rather than a reason for a conclusion".

[72] See Bogart, *supra*, note 50, at 385-86. See, also, Cromwell, *supra*, note 26, at 108.

the number of claims,[73] or multiple litigation against a defendant. We have already discussed this argument in connection with the control of the Attorney General,[74] and we see no reason to recapitulate our analysis. Suffice it to state that the "floodgates" rationale is equally infirm in this context.

### *b. The Role of the Courts and the Needs of the Adversary System*

Three justifications for the requirement of a traditional legal interest—some of which were accepted as valid by the Supreme Court of Canada in the *Finlay* case—relate to concerns about the role of the courts and the needs of the adversary system. The first is that this requirement is necessary to avoid an inappropriate expansion of the judicial role, which would empower courts to consider "political" questions better left to be resolved through the political process. Essentially, this is the same justiciability argument that we discussed in connection with the control of the Attorney General.

The second rationale relates to the institutional dimension of justiciability,[75] which is concerned with "whether the issue is amenable to satisfactory decision if approached by the means and processes employed by the courts".[76] This rationale asserts that the requirement of a traditional legal interest ensures that the courts are presented with the "concrete" factual picture necessary for adjudication, and are not asked to entertain hypothetical or abstract questions. Related to this rationale is a third justification: for the adversary system to work effectively, there must be skilled and determined advocacy, and the possession of a traditional legal interest ensures the requisite degree of zeal and competence.

We turn first to the rationale based on justiciability and "the concern about the proper role of the courts and their constitutional relationship to the other branches of government".[77] The requirement of a traditional legal interest is justified on the basis that it saves courts from deciding issues that are inappropriate for adjudication. For this rationale to be valid, there has to be a complete correlation between non-traditional legal interests and inappropriate questions, on the one hand, and traditional legal interests and proper questions, on the other.

On this basis, we do not believe that the rationale can support the requirement of a traditional legal interest. Non-traditional legal interests do not necessarily involve questions that are inappropriate for courts to decide; nor is the

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73 See, for example, *Fillion v. New Brunswick International Paper Co.*, [1934] 3 D.L.R. 22, at 26, 8 M.P.R. 89 (N.B.C.A.), and *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331, [1924] 3 D.L.R. 189.

74 *Supra*, this ch., sec. 2(b)(ii)a.

75 For a discussion of the institutional and constitutional dimensions of justiciability, see Cromwell, *supra*, note 15, at 173-75.

76 *Ibid.*, at 173.

77 *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 340.

converse true. Past experience in Canada and other jurisdictions indicates that concerns about justiciability have arisen in cases where standing has not been an issue, and that, in some cases where standing has been challenged, the justiciability of the issues has not been challenged.[78]

Whether a plaintiff has a traditional legal interest, in our view, simply is not determinative of the appropriateness of an issue for adjudication.[79] What matters is only the nature of the issues themselves, and the courts should be trusted to decide the propriety of the issues brought before them. In their reports on standing, the Law Reform Commission of British Columbia and the Law Reform Commission of Australia agreed that standing criteria were irrelevant to expressed concerns about the expansion of the judicial role. To the argument that the relaxation of standing requirements would lead to "government by judges", the British Columbia Commission responded that "the way to protect against too much government by judges is to limit what judges decide, not to limit who can raise questions for a court to decide".[80] In a similar vein, the Australian Law Reform Commission observed that "[i]f courts are ill-equipped to meet the new demands placed on them by public interest litigation, they will make unsatisfactory decisions irrespective of the criteria of standing being applied".[81]

Finally, we wish to comment that, to the extent that a concern about justiciability focuses particularly on the *expansion* of the judicial role, rather than on ensuring that courts do not consider questions inappropriate for adjudication, that concern, we suggest, has been largely overtaken by events in Canada. As we argued earlier, the advent of the Charter has already dramatically altered the role of courts.

The second rationale, which also relates to the issue of justiciability, is that the requirement of a traditional legal interest guarantees that the court will be presented with an issue grounded on a factual foundation, rather than a hypothetical or abstract question.[82] We agree with the following response to this argument:[83]

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[78] Bogart, *supra*, note 50, at 388-91.

[79] See Cromwell, *supra*, note 15, at 175:

> To the extent that the constitutional concerns relate to the nature of the question itself as opposed to how it comes before the Court, the interest test can respond to them only indirectly, if at all. For the interest test is concerned only with the relationship between the plaintiff and the issue raised in the proceedings and says nothing about the nature of the issue itself. Thus, the risk of an interested and an uninterested plaintiff bringing an inappropriate issue before the Court seems roughly equal.

[80] British Columbia Report, *supra*, note 17, at 61.

[81] Australian Report, *supra*, note 13, para. 153, at 84.

[82] See Cromwell, *supra*, note 15, at 173-75, and Craig, *supra*, note 15, at 452-54.

[83] Cromwell, *supra*, note 15, at 173.

> The 'interest' of the parties in the outcome of the proceedings says little about the concreteness of the factual picture. Parties may well have 'an interest' in the outcome of the proceedings concerning a wholly hypothetical state of facts, as for instance when parties seek an advance ruling about a proposed course of action. Conversely, parties may have no interest in the outcome of proceedings even though they arise on a completely concrete set of facts. It seems then, that 'interest' is no guarantee of concreteness and *vice versa*.

Whether a plaintiff presents a sufficient factual foundation for adjudication can be decided on a case by case basis.[84]

We suggest, moreover, that a concern that courts may be asked to answer questions in the abstract, severed from disputes between parties, may be exaggerated in Canada, however much it may be a legitimate concern elsewhere. In this country we have long accepted that reference cases may be given to appellate courts for decision, even though the issues to be settled may not rest on a factual foundation. Indeed, some of the most important and controversial public questions of the past decade have been referred to the courts for determination in this manner.[85] While the Supreme Court of Canada has a discretion not to answer questions posed on a reference, the court "has been astonishingly liberal in the questions that it elected to answer".[86]

Nor do we accept the validity of the argument that the possession of a traditional legal interest is necessary to ensure skillful, determined advocacy.[87] While we acknowledge that a person who initiates proceedings in the hope of financial gain will undoubtedly have a motivation to do her utmost to be successful, the converse is not true. The absence of a traditional legal interest does not mean that a plaintiff will present her case with any lesser degree of competence or zeal. A person without such an interest necessarily must dedicate time, money, and effort to the litigation, a substantial commitment of resources that in itself would tend to ensure vigorous advocacy.[88]

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[84] See, for example, *Re Danson and Attorney-General of Ontario* (1987), 60 O.R. (2d) 676, 41 D.L.R. (4th) 129 (C.A.).

[85] See, for example, *Re: Resolution to Amend the Constitution (Nos. 1, 2, and 3)*, [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1; *Reference re Education Act of Ontario* (1984), 47 O.R. (2d) 1, 10 D.L.R. (4th) 491 (C.A.); and *Reference re an Act to Amend the Education Act* (1986), 53 O.R. (2d) 513, 25 D.L.R. (4th) 1 (C.A.), aff'd (*sub nom. Reference re Bill 30, an Act to amend the Education Act*), [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18. See, generally, Mullan and Roman, *supra*, note 53, at 337.

[86] Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 180.

[87] Neither the Law Reform Commission of British Columbia nor the Australian Law Reform Commission has accepted that this justification is valid: see British Columbia Report, *supra*, note 17, at 61, and Australian Report, *supra*, note 13, paras. 211-12, at 116-17. The Supreme Court of Canada seems to have endorsed it in *Finlay*, although this is not entirely clear. The court made reference to the "judicial concern that in the determination of issues a court should have the benefit of the contending views of the persons most directly affected by the issue": *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 341. For a discussion, see Bogart, *supra*, note 50, at 394-96.

[88] Jaffe, "The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff" (1968), 116 U. Pa. L. Rev. 1033, at 1037-38. Indeed, Craig, *supra*, note 15, at

In a sense, the validity of all of the above rationalia is undermined by the fact that, under the public nuisance rule, the Attorney General may authorize relator actions, regardless of the interest of the plaintiff. If these rationalia were truly valid, where a plaintiff does lack a traditional legal interest and permission is given, in theory there would be a danger that any of the harms supposedly prevented by the interest requirement would occur.

### *c. "Busybodies"*

The final rationale that we shall consider appears to be less a justification for the requirements for individual standing under the public nuisance rule than a statement of principle: it is argued that, without such an interest, a plaintiff is a mere "busybody", who does not deserve standing. Stated baldly, this assertion seems no more than a reiteration of the historical common law position that a personal, pecuniary, or proprietary interest is necessary for an individual to have access to the courts. Probing deeper, however, reveals that a more subtle rationale may inhere in the meaning of the term "busybody". This justification does not support retaining the requirement of a "sufficient private or personal interest in the subject-matter",[89] but does constitute an important consideration in analyzing the question of standing.

The difficult question, of course, is to decide what attributes make a litigant a busybody against whom protection is needed. As we suggested above, one cannot accept that the absence of the personal interest necessarily makes a litigant a busybody, without deferring entirely to the traditional legal interest requirement. For the concept not to beg the question, it must mean something else.

In the debate about standing, certain commentators have suggested that traditional restrictions on standing can be defended on the basis that they prevent the results of litigation from being imposed on persons who are not

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451 (emphasis in original), has argued that a person lacking a traditional legal interest, for this reason, may be a more vigorous litigant:

> A second practical objection is that an applicant who has no interest of his own at stake will not be the most effective advocate or presenter of the issue. This is simply a *non sequitur*. No one has demonstrated any correlation between the degree of interest that an applicant has and the effectiveness of the advocacy, and there is no reason to suspect that any such correlation exists. Indeed the public spirited citizen who challenges governmental action *even though* he has no personal stake in the outcome may well be a more effective litigant simply because he will normally feel particularly strongly about the matter before bothering to bring a claim.

See, also, Cromwell, *supra*, note 15, at 173, who argued that "[s]elf-interest may be a circumstantial guarantee of diligence, but it is neither an infallible nor an exclusive one".

[89] *Minister of Finance of Canada v. Finlay*, *supra*, note 2, at 329.

before the court.[90] In focusing on the impact of litigation on non-parties, an important dimension of the busybody concept has been identified. It is the potential effect of the proceedings on others, rather than just the presence or absence of a traditional legal interest, that is crucial. This is the consideration that warrants further analysis.

That persons may be affected by litigation brought by an individual without a traditional legal interest appears to be intuitively unfair. As a matter of first impression, it seems inequitable that persons may be forced to accept consequences without having participated in the process determining those consequences, or that they be required to take action—for example, by intervention[91]—to secure their interests.

What this argument disguises is that all litigation has this potential effect, regardless of the interest of the plaintiff. If, for example, the pecuniary or proprietary interests of one hundred people are damaged by an illegal act, and only one of them elects to bring proceedings, the remainder will be affected by the judgment to the same extent as if proceedings had been brought by a person lacking such an interest.[92] Yet we do not question the standing of the party with a traditional legal interest.

Why we do not question standing in these circumstances is the key to the issue. The answer is that we have engaged in an unacknowledged balancing of competing interests, weighing the interests of the aggrieved plaintiffs and the affected non-parties. As a society, we have accepted that the importance of vindicating traditional legal interests outweighs the fact that the outcome of the proceedings may affect non-parties. Conversely, those who defend the requirement of a traditional legal interest on the ground that it prevents interference with the rights of non-parties have decided that non-traditional legal interests are of insufficient weight to implicate the interests of others who are not before the court.

We take a different view. While, as we shall see, we believe that the interests of non-parties is an important factor in determining questions of standing, we do not accept that persons with non-traditional legal interests should necessarily have no right to bring proceedings simply because others may be affected. As a general principle, we believe that the balancing of interests that is inherent in litigation advancing traditional legal interests should be equally undertaken where a person without such an interest initiates proceedings.

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90 See, for example, Brilmayer, "The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement" (1979), 93 Harv. L. Rev. 297. Compare Tushnet, "The Sociology of Article III: A Response to Professor Brilmayer" (1980), 93 Harv. L. Rev. 1698. See, also, Brilmayer, "A Reply" (1980), 93 Harv. L. Rev. 1727.

91 See *infra*, ch. 5.

92 Tushnet, *supra*, note 90, at 1724, *n.* 107.

### (d) The Distinction Between Public and Private

The operation of the public nuisance rule depends entirely on the efficacy of the distinction between private nuisance and public nuisance, and between private rights and public rights, for the dichotomy drawn between public and private decides what rules govern the question of standing, and ultimately who will have access to the courts. For a distinction to have practical validity, it must be clear and easy to apply.

Measured against this standard, the distinction between public nuisance and private nuisance and the distinction between public rights and private rights are both questionable. However, they suffer from different problems. While the distinction between public nuisance and private nuisance may clearly be stated as a matter of theory—insofar as a private nuisance concerns harm to land and public nuisance affects interests other than land—its application in individual cases may be difficult and, more seriously, can lead to indefensible and inconsistent results. With respect to the distinction between public rights and private rights, in our view, that distinction "is distinctly lacking in certainty and consistency of application".[93]

While the distinction between public nuisance and private nuisance has been criticized, for example, as being a "legal nicety",[94] of far greater concern to us is that, in its application, the standing of individuals may be dealt with differently in circumstances where it would seem reasonably clear that the same treatment is warranted. For example, an activity with widespread effect may harm surrounding land owned by a number of people and may also harm others, but not in connection with any interest in land. With respect to the former group, the conduct would be actionable by each landowner as a private nuisance, regardless of whether his damage differed in any way from that suffered by his fellow landowners. No member of the latter group, however, would be able to bring proceedings without the consent of the Attorney General, unless she could meet the test for individual standing.

Another problem with the public nuisance rule is that there simply is no correlation between the extent and severity of the damage and the accessibility of the courts to individuals. Where activity causes widespread harm, an individual who suffers "special damage" may bring proceedings for a remedy; however, if the entire "public" suffers the same harm, no one person can be said to be affected uniquely, and therefore no one is entitled to bring proceedings.[95] We find this result unacceptable.[96]

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[93] Cromwell, *supra*, note 15, at 177.

[94] *Blanchard v. Cormier* (1979), 25 N.B.R. (2d) 496, at 502, 51 A.P.R. 496 (Q.B.), aff'd (1980), 30 N.B.R. (2d) 198 (C.A.), quoted in Cromwell, *supra*, note 15, at 22 and 177.

[95] This depends on the type of injury. Cromwell, *supra*, note 15, at 24, states that "[i]t appears to be settled that personal injury or property damage suffered by the plaintiff will always qualify as special damage regardless of the number of people who suffer similar losses".

[96] See, for example, Roman, *supra*, note 16, at 15, who argues as follows:

No less troublesome is the distinction between public rights and private rights. In the first place, the world cannot be neatly divided into two such rigid categories. In our view, rights have both private and public dimensions, so that it is more accurate to conceptualize rights along a public-private spectrum.

Moreover, there are no rules or definitions to which a court may resort in classifying cases along these lines. Yet the initial determination of this question will decide whether access to the courts is subject to the control of the Attorney General or governed by the requirement that a sufficient private or personal interest be shown. Deciding whether a right is public or private in effect may predetermine a plaintiff's entitlement to bring proceedings, the reasons for which are hidden by the supposedly objective task of classifying the right in issue.

## 3. THE SUPREME COURT OF CANADA'S QUARTET

In our discussion of the present law, we explained that standing in constitutional challenges, including challenges brought under section 52 of the Charter, is governed by principles that depart dramatically from the public nuisance rule. In such cases, the Attorney General has no control over standing; rather, the matter is left to the discretion of the courts. While the possession of a traditional legal interest in the subject matter of the proceedings confers standing on an individual, such an interest is unnecessary, for under the test articulated by the court in *Borowski*, a prospective plaintiff need establish only "that he has a genuine interest as a citizen in the validity of the legislation".[97]

In *Finlay*, the Supreme Court of Canada held that the discretionary approach to standing adopted in the trilogy should extend beyond the constitutional context to a "challenge . . . to the statutory authority for public expenditure or other administrative action".[98] The court applied the *Borowski* test, and elaborated upon its meaning by explaining that each of its criteria responded to one of "[t]he traditional judicial concerns about the expansion of public interest standing".[99] The *Finlay* court also held that the same approach to standing was to be taken whether the applicant sought injunctive or declaratory relief.

From our criticisms of the public nuisance rule, it should be apparent that we welcome the direction taken by the Supreme Court of Canada in the

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> A public nuisance will normally have a much greater impact, much more broadly felt than a private one, yet the standing rule in public nuisance cases reduces access to the courts as the magnitude of the nuisance increases. The policy should be that the more widespread the problem, the more accessible the courts.

See, also, McLaren, "The Common Law Nuisance Actions and the Environmental Battle —Well-Tempered Swords or Broken Reeds?" (1972), 10 Osgoode Hall L.J. 505, at 515.

[97] *Supra*, note 4, at 606.

[98] *Supra*, note 2, at 339.

[99] *Ibid.*, at 340.

trilogy, and its extension in *Finlay*. These decisions acknowledge that assuring access to the courts for individuals who wish to raise important issues of "public interest" is a critical value in our society. The court has recognized that entitlement to raise such issues should not be predicated solely on the possession of a personal, pecuniary, or proprietary interest, but on an understanding that individuals may be generally or indirectly affected, as members of the community, by legislation and administrative measures, but in a way that nonetheless gives them an "interest" in ensuring legality. While, as we shall explain, the precise meaning of the court's standing test remains somewhat uncertain, the significance of its abandonment of the public nuisance rule cannot be exaggerated, particularly measured against the tenacity with which courts have clung to it in England.

Our first comment concerns the applicability of the court's approach to standing. While it is clear that the *Finlay* decision has extended the standing trilogy to certain challenges to administrative action, the bounds of that extension are not apparent.

At issue in *Finlay* was a challenge to "the statutory authority for public expenditure or other administrative action", in which declaratory and injunctive relief were sought. The court characterized the policy issue as "whether the same value is to be assigned to the public interest in the maintenance of respect for the limits of administrative authority as was assigned by this court in [the trilogy] to the public interest in the maintenance of respect for the limits of legislative authority".[100]

Questions have been raised about the reach of this decision.[101] For example, does "administrative authority" comprehend any challenge to the legislative authority for any administrative action taken by an official?[102] Would *Finlay* apply to applications for judicial review seeking one or more of the prerogative remedies?

While the language of *Finlay* leaves room for debate about questions such as these, we suggest that the reasoning of the court argues for an expansive interpretation. The court decided to apply the trilogy "[f]or the reasons indicated in *Thorson*",[103] and considered that "the dominant consideration of policy in *Thorson*"[104] was that there should be access to the courts to challenge the constitutionality of legislation in a federal state.[105] It stated that the standing of the

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[100] *Ibid.*, at 339.

[101] See Bogart, *supra*, note 50, at 378, and Cromwell, *supra*, note 26, at 112-13.

[102] Cromwell, *ibid.*, at 113, commented that "[p]resumably it includes exceeding powers conferred by subordinate legislation".

[103] *Supra*, note 2, at 339.

[104] *Ibid.*, at 336-37.

[105] *Ibid.*, at 336.

Attorney General to bring proceedings, whether on his own motion or through a relator, "to assert a purely public interest in the limits of statutory authority" was "a recognition of the public interest in the maintenance of respect for such limits".[106] By accepting both the importance of ensuring access to the courts and the public interest in adherence to statutory authority, this analysis would appear to apply to any challenge to the legality of government activity or conduct to which the public nuisance rule remains a barrier.

It has also been suggested that, since the rationalia for standing rules are constant, regardless of the particular remedy sought, and *Finlay* has applied the trilogy criteria in light of those purposes, the *Finlay* decision should govern standing to seek remedies other than a declaration or injunction.[107]

Notwithstanding our views about the likely pervasive implications of the *Finlay* decision, the extent of the applicability of the discretionary approach to standing remains uncertain until resolved by the courts. That such an important question should continue to be unsettled—dependent upon the outcome of inevitably lengthy and costly litigation[108]—is unfortunate. The manner in which access to our courts is to be determined should be clear.[109]

Turning from the question of its applicability to the test itself, we consider that the Supreme Court of Canada's approach to standing suffers from certain major difficulties. In our account of the present law, we examined the test articulated in *Borowski* and the interpretation given to it in *Finlay*. To place our criticisms in context, it is necessary to recapitulate that discussion briefly.

In *Borowski*, Mr. Justice Martland interpreted *Thorson* and *McNeil* as deciding the following standing test:[110]

> [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

In *Finlay*, the court applied this test, and explained that its criteria addressed "traditional judicial concerns about the expansion of public interest

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106 *Ibid.*, at 339.

107 Cromwell, *supra*, note 26, at 112-13.

108 For a discussion about the costs and delays of standing litigation, see *infra*, this ch., sec. 4.

109 For a recent case in which *Finlay* was applied, see *Re Federation of Metropolitan Toronto Tenants' Associations and City of York* (1988), 65 O.R. (2d) 245, 51 D.L.R. (4th) 731 (Div. Ct.).

110 *Supra*, note 4, at 606.

standing".[111] The relationship between the various factors and these concerns was stated by Le Dain J. to be as follows:[112]

> The concern about the proper role of the courts and their constitutional relationship to the other branches of government is addressed by the requirement of justiciability.
>
> . . . . .
>
> The judicial concern about the allocation of scarce judicial resources and the need to screen out the mere busybody is addressed by the requirements affirmed in *Borowski* that there be a serious issue raised and that a citizen have a genuine interest in the issue.
>
> . . . . .
>
> The judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue . . . is addressed by the requirement affirmed in *Borowski* that there be no other reasonable and effective manner in which the issue may be brought before a court.

We shall consider each of the above paragraphs in turn.

The necessity that the issue raised be justiciable is not one of the criteria of the test expressly articulated in *Borowski*. The court in *Finlay* accepted it as a threshold prerequisite to the exercise of judicial discretion with respect to standing.[113] The court's discussion of justiciability is brief and offers little, if any, guidance with respect to the implications and meaning of the concept, apart from acknowledging its importance to the question of standing.[114] There are, however, two matters that we wish to address.

First, we question why justiciability should be expressly identified as a requirement in respect of standing. As the court pointed out, "justiciability is always a matter of concern for the courts";[115] as such, it is a prerequisite of all litigation, independent of the question of standing. While we have no doubt of the importance of the "concern about the proper role of the courts and their constitutional relationship to the other branches of government",[116] courts can address this concern without even considering standing; *Operation Dismantle*, which the Supreme Court discussed, is an example. Given the independence of

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[111] *Supra*, note 2, at 340.

[112] *Ibid.*, at 340-41.

[113] Cromwell, *supra*, note 26, at 111.

[114] For commentary, see Cromwell, *ibid.*, at 111-12, and Bogart, *supra*, note 50, at 388-91.

[115] *Supra*, note 2, at 340.

[116] *Ibid.*

justiciability from standing, for purposes of analysis, it is difficult to see how the former can be a requirement for the latter.

Second, the statement that "justiciability . . . is a matter of particular concern in the recognition of public interest standing"[117] may lead to difficulties of the kind that we have discussed earlier.[118] If this assertion is based on the assumption that persons seeking to vindicate non-traditional legal interests necessarily raise non-justiciable issues, we cannot agree with it, since it would mean that a heavier burden would be placed unjustifiably on such litigants. We have already agreed with the view of one commentator that "justiciability . . . does not honour boundaries between pecuniary and proprietary interests and those that cannot be so characterized".[119] What is important is the nature of the issues, not whether the person bringing proceedings has a traditional legal interest. Courts should decide justiciability independently of the latter consideration.

We have considerably greater difficulties with the next two paragraphs. We shall turn first to the requirements that there be a serious issue raised and that the citizen have a genuine interest in the issue, which are said to respond to "the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody".[120]

The first problem with these requirements is that each of them is uncertain and unclear. What are the attributes of a "serious" issue? What are the characteristics of a "genuine" interest? Both of these criteria have been criticized for their ambiguity and absence of any guidance.[121] Nor does the court's application of the criteria in the *Finlay* case assist us in divining their meaning. In discussing the issues raised, the court concluded that they are "far from frivolous".[122] While this obviously suggests that a frivolous issue could not be a serious issue, it does not explain how far from frivolous an issue must be to be serious. Moreover, it raises questions whether the seriousness of an issue relates to its general public importance or its substantive merits. In applying the "genuine" interest prerequisite, the court found that the requirement had been satisfied because Finlay had complained that he had been prejudiced by the alleged failure of the Province to comply with the Canada Assistance Plan. But to say that an individual who claims personally to have suffered a pecuniary disadvantage has a genuine interest is neither novel nor particularly informative concerning the meaning of genuine interest.

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117 *Ibid.*

118 *Supra*, this ch., sec. 2(c)(i)b.

119 Bogart, *supra*, note 50, at 388.

120 *Supra*, note 2, at 341.

121 See Mullan and Roman, *supra*, note 53, at 321-25; Bogart, *supra*, note 50, at 391; and Cromwell, *supra*, note 26, at 112.

122 *Supra*, note 2, at 341.

The court's explanation that the requirements of a serious issue and a genuine interest address concerns about the allocation of scarce judicial resources and the need to screen out "mere busybodies" does not facilitate determining when a person has a "genuine" interest in a "serious" issue.[123] The court seemed to say that, given the dearth of judicial resources, in deciding who is to have access to the courts, persons with a genuine interest should be preferred to "mere busybodies". That is a proposition with which few, if any, would disagree. The difficulty is deciding who are the persons with a genuine interest and who are the busybodies. In this crucial respect, the *Borowski* standing test, as applied by *Finlay*, can be regarded as deficient.

Without further elaboration, to find that a plantiff has a genuine interest is simply to state that she is a person who deserves standing and, conversely, a "mere busybody" is a person who does not. Neither "genuine interest" nor "mere busybody" is a self-defining term that informs us why a person should or should not be allowed to proceed. Each term, in essence, is a conclusion about whether standing should be granted to an individual in the circumstances. To rely on the "genuine interest" test to filter out "mere busybodies" is to employ a circular, uninformative analysis, disguising the court's determination of the critical question whether a person should be entitled to access to the courts.[124]

In making this criticism, however, we must reiterate a point made earlier, namely, that insofar as a professed concern about busybodies identifies the need to consider the impact of proceedings on others who are not before the court, it is, in our view, a relevant consideration to deciding the question of standing. Similarly, to the extent that "genuine" interest undoubtedly imports a conviction that not all claims for access to the courts deserve recognition, it correctly implies that a process of claims evaluation and balancing is inherent in determining questions of standing. We shall discuss these considerations in the next chapter.

The third requirement discussed by Le Dain J. in *Finlay* is "that there be no other reasonable and effective manner in which the issue may be brought before a court".[125] According to Le Dain J., this responds to "[t]he judicial concern that in the determination of an issue a court should have the benefit of the contending views of the persons most directly affected by the issue".[126]

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123 Cromwell, *supra*, note 26, at 112, commented that "[i]t is not enough . . . simply to link, as the Court does in *Finlay*, the concern about the busybody to whether the plaintiff has a 'genuine interest' in a 'serious question' without exploration of what a genuine interest or a serious question is or how they respond to concern about busybodies".

124 In another context, Cromwell, *supra*, note 15, at 91, stated that "[t]he statement that the plaintiff has 'sufficient interest' is a short-hand and often conclusory way of saying that the Court will, or may, accede to the plaintiff's contention that the law does, or ought to, afford some protection of the particular interest".

125 *Supra*, note 2, at 341.

126 *Ibid.*

We suggest that this requirement poses certain difficulties, which are not cured by linking it to the stated policy rationale. On a practical level, we question how a plaintiff is to prove that it is met. In discussing this requirement, the court considered whether there is anyone "with a more direct interest than the plaintiff in a position to challenge the statutory authority".[127] Referring to the *Borowski* decision, the court seemed to accept that a plaintiff must show that it is unlikely that a person with a more direct interest would bring proceedings on her own. Yet, if a plaintiff is required to show that proceedings by a person with a more direct interest are not likely, a question arises as to what "standard of unlikelihood" is to apply. A further question relates to the kind of evidence required to indicate a probability that an event will not occur. We suggest that, if a plaintiff is required to prove that proceedings by another, who as yet has taken no action whatsoever, are unlikely, the inquiry will be necessarily speculative and uncertain.[128] Finally, the court did not explain what is a "more direct interest".

The court also suggested that, depending on the nature of the legislation, this requirement may be satisfied by proof that the Attorney General had refused a prior request to institute proceedings. The court stated that *Finlay* was not a case in which it was necessary to show a prior request to the Attorney General, for "it [was] clear from the position adopted by the Attorney-General in the case that he would not have consented to the institution of proceedings".[129]

In the underlying rationale for this requirement, the court seemed to accept that either a person with a more direct interest or the Attorney General would be a better advocate than the plaintiff or applicant whose standing is attacked.[130] This follows, we suggest, from the concern, stated by Le Dain J., that the "court

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127 *Ibid.*

128 In their comment on *Borowski*, Mullan and Roman, *supra*, note 53, at 329-30, criticized this requirement as follows:

> At best, the court's assessment of whether persons directly affected are likely to challenge will be no more than a perhaps experienced hunch about the possibilities of litigation on a particular issue by persons not before the court. This is so since hard factual evidence which might permit a rational assessment of probability is impossible to obtain . . . . Moreover, even if the evidence were available, there remains the question of how much of a chance is a good enough chance and how this issue should be related to other variable factors such as the seriousness of the issue and the plaintiff's own demonstated interest in and length of association with the issue.

129 *Supra*, note 2, at 342. While it is not explained, what the court might have been contemplating is a case like *Thorson*, where the legislation or action in question is of general application, so that there would be no persons "most directly affected by the issue": *ibid.*, at 341. The court stated that "[i]n *Thorson*, *McNeil* and *Borowski* that requirement was held to be satisfied by the nature of the legislation challenged and the fact that the Attorney-General had refused to institute proceedings although requested to do so": *ibid.*

130 Cromwell, *supra*, note 26, at 111, stated that "[t]he concern for concrete adverseness is addressed by the factor that there be no other reasonable and effective manner in which the issue might be brought to Court, having regard to the nature of the issue and the legislative scheme".

should have the benefit of the contending views of the persons most directly affected by the issue".[131] This appears to reflect an institutional concern about the adjudicative needs of courts, rather than a concern for persons whom the proceedings may affect.

The court gave conflicting messages about whether this requirement also might reflect a concern about ensuring access to the courts for justiciable issues that would not otherwise be decided. Its articulated rationale certainly does not support this interpretation. Yet, the court's rather terse discussion of the Attorney General hinted at such a concern. The court stated that "a prior request to the Attorney-General to intervene might be considered to be necessary in certain cases to show that there is no other way in which the issue may be brought before a court".[132]

Turning to matters of principle, as we have argued earlier,[133] assuming that a "more direct interest" refers to a traditional legal interest, the absence of such an interest does not mean that a person will present her case in a less skilled or determined manner than a person with a traditional legal interest. Moreover, on a more fundamental level, we question whether the existence of a person with a direct interest may be relevant at all, except insofar as her rights may be affected by the proceedings. The apparent view of the court that a plaintiff who would otherwise have standing might be denied standing in deference to a person with a more direct interest seems to assume that the two would present the same arguments and advance the same interests. Yet the perspectives of the two might be very dissimilar. A person with a more direct interest than the plaintiff presumably would seek to vindicate that interest, and understandably would shape her case in furtherance of that objective. A person without a traditional legal interest might be expected to raise different issues or bring a very different perspective to the issues, one that would not necessarily form part of the case of a person whose aim is to protect her own personal interests. Furthermore, a person with a more direct interest might be very willing to accept a favourable settlement offer, which would end the proceedings with respect to all the issues in the litigation, regardless of the interests of others.[134]

With respect to any necessity of first asking the Attorney General to take proceedings, we have no doubt that the Crown is in the position to marshall its considerable resources to be a skilled and resolute advocate. Nonetheless, we would argue that this should be an irrelevant consideration in determining standing. Moreover, where the government is the defendant, requiring a plaintiff to request that the Attorney General bring proceedings against the Crown seems a useless and unduly formalistic exercise, particularly where a court may grant standing despite a refusal by the Attorney General.

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131 *Supra*, note 2, at 341.

132 *Ibid.*, at 342.

133 *Supra*, this ch., sec. 2(c).

134 Bogart, *supra*, note 50, at 395.

## 4. PROCEDURAL MATTERS

In this chapter, we have thus far focused our criticisms on the substantive law of standing. We cannot, however, disregard the undeniably important factor that the substantive law operates within a procedural framework. It is to this aspect of the law that we now turn.

Under the Rules of Civil Procedure, a proceeding may be struck out at a preliminary stage on a variety of grounds. In some circumstances, the Rules may operate to the disadvantage of plaintiffs, who, when a motion is brought challenging their standing, may be faced with lengthy delay and great personal expense. Under the Rules, a defendant may bring such a motion[135] on at least three days notice before the date of the hearing;[136] he may serve his factum on the plaintiff on the day before the hearing.[137] This may give the defendant an advantage, for while, in the absence of an adjournment, his adversary must be prepared to respond to his argument on relatively short notice, he is not similarly constrained. Even if a plaintiff successfully resists a challenge to standing, his proceeding will nonetheless have been delayed and he will have incurred additional expense. If unsuccessful, the defendant may seek leave to appeal the determination of standing. Given the delay and expense that might arise from an initial challenge to standing, defendants, in effect, are encouraged to bring motions.[138] Whatever the outcome, their adversaries may suffer potentially grave disadvantage.

Extreme examples of the possibility of prejudice may be found in *Thorson*, *McNeil*, and *Finlay*. In the case of Mr. Thorson, almost three years elapsed from the date of filing the notice of motion challenging his standing to the date of the Supreme Court of Canada's judgment. For Mr. McNeil, ten months elapsed before standing was determined.[139] In *Finlay*, the Supreme Court of Canada's decision was delivered over four years after Mr. Finlay had first brought proceedings.[140] After these various delays, each of the "successful" plaintiffs simply "had arrived at the beginning".[141] Moreover, the expense of carrying an appeal to the Supreme Court of Canada is substantial, even if the sole issue is standing. Apparently, the total legal fees of McNeil were approximately $44,000, of which between $20,000 to $25,000 were devoted to establishing his standing.[142]

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135 See, for example, Rules of Civil Procedure, *supra*, note 37, r. 21.01.

136 *Ibid.*, r. 37.07(1) and (6). See *supra*, ch. 2, sec. 6.

137 Rules of Civil Procedure, *supra*, note 37, rr. 21.03 and 37.10(7).

138 However, should a court be satisfied "that the motion ought not to have been made", the defendant would suffer costs consequences: *ibid.*, r. 57.03(1).

139 Roman, *supra*, note 16, at 41.

140 Cromwell, *supra*, note 26, at 104.

141 *Ibid.*

142 Roman, *supra*, note 16, at 41. Roman, *ibid.*, points out that, as Mr. Thorson represented himself, it is difficult to estimate what his costs would otherwise have been.

## 5. CONCLUSIONS

In this chapter, we have discussed why we believe the law of standing is seriously wanting. Our criticisms can be briefly summarized.

The public nuisance rule inappropriately gives the Attorney General control over access to the courts in public nuisance cases and litigation involving "public rights". To the extent that, after *Finlay*, this rule continues to apply to litigation against the government, the rule is particularly offensive, as it places the Attorney General in a position of direct conflict of interest, for he is both the sole person entitled to bring the proceedings and the person charged with defending the Crown.

Notwithstanding the Attorney General's control, under the public nuisance rule an individual may have standing to bring proceedings where she can show what we have called a "traditional legal interest". In our view, this places standing on an unduly narrow basis, and involves the reflexive application of private law reasoning and principles to proceedings of an entirely different character. This requirement prevents the law from responding to conduct having a generalized, diffuse effect because no one person can demonstrate a unique personal interest. It stultifies the law by fixing its gaze on pecuniary and property interests alone.

In the Commission's view, the justifications offered in support of both the Attorney General's control and the requirement of a traditional legal interest are not convincing. The stated reasons are either invalid themselves, or do not support the rule.

Finally, the operation of the public nuisance rule depends on difficult and technical distinctions. The distinction between "difference in kind" and "difference in degree" is extremely elusive, and can lead to the denial of a remedy to persons who suffer harm even to traditional interests, should their injuries be characterized as merely being different in degree from that inflicted on the public at large.[143] The distinction between public nuisance and private nuisance, and between public rights and private rights, may be difficult to apply in practice. More seriously, the operation of the distinction results in the indefensible situation that the extent of access to the courts is not commensurate with the harmful effects of conduct. Despite legislative changes,[144] this problem is of particular concern in the area of environmental law.

As a result of the Supreme Court of Canada's quartet of standing cases, the public nuisance rule has been abandoned in favour of a discretionary

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[143] See discussion in note 95, *supra*.

[144] See *Environmental Protection Act*, *supra*, note 8, s. 87(2), and *Fisheries Act*, *supra*, note 8, s. 42(3).

approach to standing in the context of constitutional challenges and certain administrative challenges. The court enunciated a test for standing in the *Borowski* case, which it refined somewhat in *Finlay*. Yet, there remains a residuum of uncertainty, for the extent of the applicability of the *Finlay* decision is as yet unsettled. Moreover, as we have explained, there are serious difficulties in the court's test for standing, not the least of which is that its crucial requirement of a "genuine interest" is conclusory in nature, affording no real guidance as to how one is to decide which claims deserve access to the courts. In short, the *Borowski* test, despite its elaboration in *Finlay*, leaves unanswered important questions about standing, with the result that the apparent certainty of a "test" is undermined.

Our observations about the procedural implications of the law of standing buttress our conviction that the law is seriously deficient. Not only are the substantive principles governing standing flawed, but their application within the ordinary procedural milieu may further diminish access to the courts.

As a matter of principle, we firmly believe that the basis of standing in Ontario should be expanded. We have criticized the public nuisance rule for placing access to the courts on too narrow a basis, and making the possession of a personal, pecuniary or proprietary interest the only key to the courthouse door. Our criticism has focused on the need for the law to be capable of accommodating other interests, which reflect the fact that individuals may be harmed by conduct in a way that is not tied to a traditional legal interest.[145]

Our concern for the recognition of interests other than those that traditionally have been protected by the law reflects our view that in the twentieth century the relationship of the individual to government has changed from that prevailing in the liberal state of the nineteenth century, and that the law of standing should be consistent with that change. Prior to the twentieth century, the dominant value was an individualism that expected little, if any, intervention by the government, and required individuals to look after their own interests, which it was presumed they could do. Private interests and public interests were seen as entirely distinct. The law of standing reflected this world.

In the twentieth century, however, government has become increasingly responsible for the welfare of its citizens, and individuals have claimed a greater role in participating in decisions made by government and, generally, in advancing the "public interest" in a variety of contexts. The relationship between the individual and the state has, therefore, changed fundamentally.

In our view, the law of standing should reflect this altered state of affairs. It should be capable of responding to "expressions of the values that individuals wish their society to respect".[146] To some extent, the law in Canada has already moved in this direction. Most dramatic has been the enactment of the *Canadian*

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145 *Supra*, this ch., sec. 2(c).

146 Australia, The Law Reform Commission, *Access to the Courts - I Standing: Public Interest Suits*, Discussion Paper No. 4 (1977), at 4.

*Charter of Rights and Freedoms*.[147] Moreover, we have seen a partial recognition of this development in the Supreme Court of Canada's standing quartet. Otherwise, however, the law of standing has greeted the new world with the tools of the old. It is now the time to fashion new tools.

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[147] *Supra*, note 7.

# CHAPTER 4

# THE LAW OF STANDING: PROPOSALS FOR REFORM

## 1. INTRODUCTION

In chapter 2 of this report, the Commission examined the manner by which courts determine who may have access to the judicial process in order to advance particular claims. We then turned, in chapter 3, to a consideration of the deficiencies in the present law and the case for reform. In this chapter, we shall set forth the Commission's recommendations for reform of the law of standing, except those pertaining to costs (to be dealt with in chapter 6). We begin, however, with a few introductory comments.

In chapter 3, we rejected certain arguments, such as the "floodgates" argument, marshalled against the creation of a more liberal standing regime and in favour of the existing, generally restrictive rules. But we have seen that certain other rationalia for some type of screening process occupy, for us, a more legitimate position. For example, courts must always consider the implications of, and therefore may wish to prevent, the continuation of a multiplicity of actions arising from the same set of facts. While we do share the view of the Law Reform Commission of British Columbia and others[1] that the fear of being engulfed by such litigation can easily be exaggerated and therefore "should rarely be controlling",[2] we believe that the issue cannot be ignored. However, in our view, problems of multiplicity and duplication that may arise in particular cases should be dealt with as they are today, that is, by appropriate specific rules, rather than by a general prohibition on standing in respect of certain types of claim.

The same conclusion applies, as well, in respect of problems caused by mere "busybodies", against whom it is said the law of standing is directed.[3] In the first place, the normal disincentives to litigation will discourage most of those persons for whom the litigation would be of no, or very limited, practical

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[1] Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, LRC 46 (1980) (hereinafter referred to as "British Columbia Report"), at 59, and Cromwell, *Locus Standi*[:] *A Commentary on the Law of Standing in Canada* (1986), at 214. The British Columbia Commission's report is discussed *infra*, Appendix 2, sec. 2.

[2] Cromwell, *supra*, note 1, at 214.

[3] See, generally, *supra*, ch. 3, sec. 2(c).

use.[4] But, more importantly, we must recognize that those who do not have a traditional legal interest cannot simply be characterized as busybodies who ought automatically to be excluded from the judicial process. Conversely, under certain circumstances even so-called "interested" persons may rightly be perceived to be officious intermeddlers.

For example,[5] let us assume that A negligently injures B, who refuses to sue. B's medical expenses are borne by the province, so that C, a taxpayer, wishes to sue A to recover the amount paid indirectly by C to cover B's costs. Why is it that we would most likely wish to refuse standing to C, yet accept the legitimacy of Mr. Thorson's entitlement to his day in court? Why is Mr. Thorson's interest—also the interest of a taxpayer—in the legality of government conduct different from C's interest in pursuing negligent individuals?

It is true that, when we compare C's interest in the outcome of the litigation to B's, B's interest is more direct and intimate. Yet, in our view, this should not be determinative in itself: a person with a non-traditional interest is not necessarily less worthy of protection than a person with a traditional interest. However, as a society we do engage in normative decision-making; we do evaluate and weigh competing interests, in the course of which we attach different degrees of value or importance to each interest. Therefore, in the type of case referred to above, we would likely refuse to grant C standing on the basis that B's decision to sue or not to sue ought to be treated as final and binding on other potential plaintiffs.[6] According to one leading commentator, in the preceding illustration the "busybody is excluded because such a person tends to defeat [the court system's] encouragement of informal compromise and forebearance".[7] Moreover, C's suit might interfere with any action that B may subsequently wish to bring; such conduct on C's part would inevitably involve B, even though at this juncture B does not wish to proceed against A.

While the law does not invariably balk at involving those who do not wish to participate in litigation that will affect them—the class action is an obvious example—we do accept the principle that, in a good many cases, deference should be paid to the most obviously and directly affected person. Our endorsement, as a society, of such a principle is, then, an endorsement of some type of screening device, some restrictions on who ought to be allowed to litigate certain kinds of claim in certain circumstances. Other values—that is, values other than, for example, the promotion of legality in public or private conduct—must necessarily claim our support. We shall return to these other values, and what effect they ought to have, when we set forth the Commission's proposed new test for standing.

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[4] Cromwell, *supra*, note 1, at 192. See, also, Bogart, "Standing and the Charter: Rights and Identity", in Sharpe (ed.), *Charter Litigation* (1987) 1, at 5.

[5] Cromwell, *supra*, note 1, at 170.

[6] *Ibid.*, at 192. This matter is dealt with *infra*, this ch., sec. 3(b)(iii)b(5).

[7] Cromwell, *supra*, note 1, at 171.

Our conclusion, therefore, is that there indeed are rationalia that do justify, as a matter of general principle, some sort of screening device, although, as we shall see, we reject completely the view that the determination of the question of standing should turn on the factors that animate much of the present law. It does, of course, bear emphasizing that the rationalia that we do endorse "are not of equal weight and none justifies a general bar. They do, nonetheless, provide an underpinning for some rules limiting access to the courts".[8] Accordingly, we do not believe that the appropriate response of the law should be simply to ignore the valid justifications for some type of screening and, thereby, open the door fully to the courts for all possible claims.

The Commission is of the opinion that in *all* areas of the law—even in the more liberal "public interest" field of constitutional law—there are legitimate reasons why not every claim should be entitled to be advanced in court. And while, as a matter of principle, we may acknowledge, as did the Australian Law Reform Commission, "the proper interest of all citizens in the performance of public duties",[9] there are other factors that, we believe, militate against unrestricted access. Indeed, the Australian Commission itself was sensitive to the problems of open standing, for it ultimately rejected that approach and opted for a type of screening process.[10]

We are firmly of the view that the principle of open standing, whether or not confined to particular categories of litigation, such as "public interest" or "environmental" litigation, is fundamentally flawed because it does not address the critical problems concerning who, and what kinds of claim, ought to be granted access to the courts. By accepting the legitimacy of *all* interests, open standing is overinclusive and indiscriminate in its application. And, from an economic perspective, even if the adoption of open standing would not substantially increase costs in respect of the administration of justice—and we do not necessarily accept this proposition—it does not recognize the public subsidy involved in granting access to the judicial process. Consequently, in a world of finite financial resources, it does not deal adequately with the question of who should receive this subsidy.

To this point, the Commission has endorsed some type of screening rules in respect of all kinds of civil litigation.[11] The next question concerns whether,

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[8] *Ibid.*, at 197.

[9] Australia, The Law Reform Commission, *Access to the Courts - I Standing: Public Interest Suits*, Working Paper No. 7 (1977) (hereinafter referred to as "Australian Working Paper"), para. 2.93, at 71. See *infra*, Appendix 2, sec. 3(a)(ii).

[10] For example, the Australian Commission was concerned that, with open standing, a defendant would be exposed to several suits over the same issue. See Australian Working Paper, *supra*, note 9, para. 2.74, at 61.

The problem of attempting to distinguish clearly a class of rights or interests exclusively on this basis was examined *supra*, ch. 3, sec. 2(d).

[11] For possible exceptions to this principle, see discussion *infra*, this ch., sec. 3(c).

having regard again to what we consider to be the legitimate rationalia for a generally applicable law of standing, different kinds of screening device should be made to apply in different contexts. Or should there be a single standing rule, applicable uniformly to all civil proceedings?

From our examination and critique of existing law in chapter 2, we have come to recognize that there is today no unified, single law of standing in Ontario. Indeed, it has been suggested that what we call the "law of standing" may be only a rather artificial construct consisting "of a number of rules developing in a number of different doctrinal and remedial contexts, frequently with very little attempt [by the courts] to reconcile outcomes with those obtained in parallel situations".[12]

The Commission has concluded that, however explicable historically, the present profusion of rules, designed to deal with standing in a variety of different situations, is no longer justifiable. For example, the existing dichotomy between "public nuisance" and "private nuisance" is, we believe, an insufficiently rational foundation on which to base two separate sets of standing rules. Its focus on whether or not there has been an interference with the enjoyment of *land* is arbitrary and, today, unacceptable in both theory and practice. It fails to recognize that public and private elements mix in a significant number of civil proceedings. A so-called public nuisance—for example, the emission of a noxious gas throughout the countryside—may well be no more than an accumulation of many private harms, while a private nuisance—for example, the pollution of the beaches of all cottagers on a lake by a giant chemical plant—may have serious "public interest" implications. The examples are legion, and they illustrate the view that the law of standing must move away from a depiction of litigation in terms of discrete, and, more often than not, unworkable classifications of cases (such as proceedings involving "public", as opposed to those involving "private", interests). The law should accept the fact that cases fall on a spectrum.

Indeed, we are convinced that any new standing regime must assiduously avoid the preservation or creation of *any* type of rigid classification system under which courts are called upon to determine whether a particular action falls into a particular class of cases, with access to the judicial process being dependent exclusively upon this difficult, often arbitrary, determination.

Therefore, subject to the exception noted below, the Commission has concluded that there is no reason to create separate and distinct standing rules for specific contexts, such as environmental law, constitutional law, or administrative law. Aside from the fact that, in practice, these methods of classification are vague and imprecise, more fundamentally we believe that the legitimate purposes served by standing rules, and the exercise in which the courts are engaged when they determine questions of standing,[13] cannot in principle reasonably

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[12] Cromwell, *supra*, note 1, at 11.

[13] See discussion *infra*, this ch., sec. 3(b)(i).

justify anything but a single, uniform standing regime applicable in all civil proceedings and in all contexts. The standing issues raised before a court, and the approach that we believe the court should take in resolving these issues, are, in this sense, the same in each and every case.

Having regard to these conclusions, the Commission recommends that, subject to the right to commence and maintain a proceeding that is conferred by or under any legislation other than the Act proposed by the Commission in this report,[14] the present provincial law of standing should be abolished, to be superseded by a single new, more liberal rule respecting the commencement and maintenance of proceedings. The proposed rule should be applicable to all types of civil proceeding, including proceedings under the *Judicial Review Procedure Act*.[15] The new rule[16] that we believe ought to govern the determination of standing questions should, at a minimum, build on the liberalizing developments in the case law, particularly in the constitutional and, to some extent at least, administrative law areas.[17] Central to the Commission's regime should be a statutory provision making it clear that no proceeding shall be dismissed and no pleading struck out only on the ground that the person bringing the proceeding has no personal, proprietary, or pecuniary interest in the proceeding, or that the person has suffered or may suffer injury or harm of the same kind or to the same degree as other persons.[18]

In order to ensure, as much as possible, that the Commission's proposed new legislation will be read expansively and liberally, so as to increase access to the courts by granting the right to commence and maintain a proceeding to

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[14] See the Commission's proposed *Access to Courts Act* (hereinafter referred to as "Draft Act"). The Draft Act appears as Appendix 1 of this report. The effect of other legislative provisions granting a right to commence and maintain a proceeding is discussed *infra*, this ch., sec. 3(c).

[15] R.S.O. 1980, c. 224.

[16] With respect to the application of the proposed new rule, including its constitutionality, see *infra*, this ch., sec. 3(d).

[17] See, in the constitutional law area, *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588; and, in the context of administrative law, *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (subsequent references are to 33 D.L.R. (4th)).

It should be noted that, in *Borowski v. Attorney General of Canada*, unreported (March 9, 1989, S.C.C.) (hereinafter referred to as "Borowski II"), the Supreme Court of Canada held that the plaintiff had lost his standing because the basis on which it had originally been granted had disappeared with the striking down of what was then s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34. With respect to the unconstitutionality of s. 251, see *R. v. Morgentaler (No. 2)*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385.

[18] Draft Act, s. 2(3). See Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985) (hereinafter referred to as "Australian Report"), Draft Bill, s. 8(3). The Australian Report is discussed *infra*, Appendix 2, sec. 3(a)(iv).

many persons who now would not have that right, the Commission recommends the enactment of a section in the legislation expressly articulating this purpose.[19] We note that a number of important Ontario statutes, including the *Family Law Act, 1986*[20] and the *Freedom of Information and Protection of Privacy Act, 1987*,[21] contain such provisions.

By abolishing, among other things, the public nuisance rule, legislation implementing our preceding recommendations would preclude the Attorney General from exercising his existing right to block access to the courts. As a necessary concomitant, such legislation would also abolish relator actions; under the Commission's proposed regime, such actions would, of course, be entirely functionless and unnecessary.

However, we do wish to stress that our proposals are not intended to limit or affect in any way the right of the Attorney General to commence a civil proceeding to the extent permissible by law, and we so recommend.[22]

The Commission's proposed regime would go considerably farther than the liberalizing trends in the case law, in that it would apply to all civil proceedings. Courts would be given a large measure of freedom in recognizing or not recognizing a particular type of interest in a variety of contexts. It would prevent courts from automatically using the absence of a traditional legal interest or a "special" or "genuine" interest to bar proceedings at the outset.

It is envisaged that, as a practical matter, the new standing regime recommended by the Commission will reduce the likelihood of attacks on a plaintiff's standing. Non-traditional legal interests have long been viewed suspiciously by the courts because such interests lack the personal, proprietary, or pecuniary elements that have historically been held sacred. On this basis, defendants have challenged plaintiffs' standing regardless of how important the issue, how widespread the litigation's likely impact, and how meritorious the plaintiffs' claim. Even if a defendant's attack proved ultimately unsuccessful, it could delay the proceedings and increase expenses, thus helping to derail the plaintiff's action,

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19 Draft Act, s. 1.

20 S.O. 1986, c. 4, Preamble.

21 S.O. 1987, c. 25, s. 1.

22 As a general rule, the Attorney General enjoys an unfettered right to initiate proceedings with respect to the infringement of a public right. However, the court may refuse standing to the Attorney General where the public right sought to be enforced arises from a private agreement to which the Attorney General is not a party: *Attorney-General v. Poole Corporation*, [1938] 1 Ch. 23, [1937] 3 All E.R. 608 (C.A.). Moreover, in the field of administrative law, it appears that the courts may also have a discretion to refuse standing where the Attorney General seeks judicial review of decision of a statutory tribunal: *P.P.G. Industries Canada Ltd. v. The Attorney General of Canada*, [1976] 2 S.C.R. 739, (1975), 65 D.L.R. (3d) 354.

For a discussion of the right of the Attorney General to seek intervenor status, see *infra*, ch. 5, secs. 3 and 5(b).

particularly, as is so often the case, where the plaintiff has fewer financial and emotional resources. However, if the requirement of a traditional legal interest, or a "special" or "genuine" interest, is removed as a barrier, as we propose, and there are other and obviously good reasons why the proceedings are being brought, in many instances defendants are likely to perceive a challenge to standing as pointless.

## 2. APPROACHES TO REFORM

### (a) General

Clearly, the abolition of the present standing rules is an essential, but not a sufficient, response to the generally restrictive and arbitrary nature of those rules. Abolition would simply leave a void, necessarily to be filled by new rules governing the right to commence and maintain a proceeding. It is, of course, possible that the courts themselves would adopt a liberal regime akin to the one proposed in this report, so that more comprehensive remedial legislation would not be necessary. However, even if this were done, it might well take considerable time to develop fully. But the outcome of such a process cannot, in fact, be predicted with any degree of certainty. New standing rules might turn out to be no more adequate than the existing ones. Accordingly, we believe that a statutory response, beyond mere abolition of the present law, is necessary in order to indicate to the courts, and to potential litigants, the basis on which we believe the right to sue should be conferred or denied.

In attempting to deal with this vital issue of statutory reform, the Commission has come to acknowledge a critical, and inhibiting, fact—one that puts our quest for reform in some perspective—namely, that the question of standing has always plagued and continues to plague most, if not all, legal systems. None, to our knowledge, has arrived at a completely satisfactory solution despite the variety of approaches to reform that have been suggested. For example, there has been a particularly voluminous body of case law on standing in the United States, with a correspondingly large volume of analysis and reform discussion in journals and texts. Yet, any student of American standing law can attest to the essentially confused position of the standing rules in that legal system. The doctrinal shifts and inconsistent application of American standing law by the courts indicate the lack of a clear approach and guidance, and the divergence of reform opinion testifies to the absence of any obvious solution having evolved.

The universality of the problem and the variety of attempts to address it clearly suggest that there are no easy, and certainly no perfect, solutions. The deficiencies in the various attempted solutions are informative in themselves, in that they indicate what issues must be addressed and what obstacles must be overcome. But we harbour no illusions concerning what can be expected of any reform measures offered in this area of the law.

Generally, the problem with most existing reform measures—and one that can, of course, be found in many other attempts to remedy defects in the

common law—is that they involve the use of blunt instruments to perform a difficult and highly delicate task. In our view, we must avoid the arbitrary inclusions and exclusions—the pigeon-holing—of existing law; rather, a measure of flexibility must be central to any approach we take to reform of the law of standing in civil proceedings. However, we also recognize that flexibility can create similar problems of arbitrary and contradictory results where the governing legislation does not also provide sufficient guidance to the courts. Therefore, our objective has been to create what may be called structured statutory flexibility.

A *structured* flexibility is necessary not simply for the sake of uniformity in respect of judicial decision-making. It is also an express acknowledgment that what we ultimately choose as an alternative to the existing standing requirements cannot masquerade as being devoid of normative values. Consequently, the test that we adopt must give proper statutory guidance to the courts in recognizing and applying various values that bear on the issues raised at a standing hearing. We believe that, because important societal values are necessarily implicated, it is only proper that the Legislature give such guidance on a matter as important as access to the courts.

### (b) Alternative Approaches

We turn now to a consideration of several possible approaches to reform of the law of standing. The alternatives canvassed below do not, however, purport to represent an exhaustive list; but they do reflect the options considered by this Commission and reform bodies in several other jurisdictions.

#### (i) Open Standing

As we indicated earlier in this chapter, one possible approach to standing is to remove all barriers whatsoever, either generally, or in respect of all so-called "public interest" litigation, or in respect of specific categories of "public interest" litigation, such as environmental or constitutional litigation, for example.

While this alternative does have adherents,[23] it will be recalled that, in our earlier endorsement of certain rationalia that we believe justify the imposition of some type of standing rule, we necessarily rejected the concept of open standing, whether applicable generally or to specific types of litigation.[24]

#### (ii) General Formulae

In chapter 2, we saw how the Supreme Court of Canada, after disengaging itself from espousing the paramountcy of traditional legal interests in all

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[23] Subject to some procedural prerequisites in certain cases, the Law Reform Commission of British Columbia opted for open standing for "public interest proceedings": British Columbia Report, *supra*, note 1, at 72. The Commission was even more liberal in respect of standing in constitutional litigation: see *ibid*.

[24] *Supra*, this ch., sec. 1.

circumstances, was rather vague about how standing decisions should be made in particular cases. The court essentially retreated behind a simple verbal formula—"genuine interest" in the issue being litigated—without explaining precisely how courts were to determine whether the interests advanced were "genuine". It is the attempt to overcome the complexities and difficulties masked by such a general formula, and to provide some meaningful statutory guidance to the court, that, in our view, lies at the heart of reform of the law of standing.

Reports from other law reform agencies all move towards liberalization; but they too do not really articulate the process by which a court should go about making standing decisions. Except for the Law Reform Commission of British Columbia, all such agencies have settled on a verbal formula in the hope that it would lead courts to rational, principled decision-making. Proposals by law reform agencies or commentators have used such expressions as "sufficient interest",[25] "real concern",[26] "adversely affected in fact",[27] and, in order to exclude certain claims, "merely meddling".[28] Sometimes these formulae have been linked to the advancing of a "public interest", with little or no explanation of what that term is supposed to include.

Simple verbal formulae, while superficially attractive, lack specificity and structure. They may well manifest a laudable acceptance that new, non-traditional,

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[25] England, The Law Commission, *Report on Remedies in Administrative Law*, Law Com. No. 73 (Cmnd. 6407, 1976) (hereinafter referred to as "English Report"), para. 48, at 22, and accompanying Draft Bill, s. 1(3). The recommendation was enacted in the Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977/1955. See R.S.C. 1965, O. 53, r. 3(1) and (7). A number of provisions in the rules relating to applications for judicial review have been incorporated, with some amendment, in the *Supreme Court Act, 1981*, c. 54, s. 31.

The majority of the New Zealand Public and Administrative Law Reform Committee adopted the Law Commission's test and its rationale: *Standing in Administrative Law*, Report No. 11 (1978) (hereinafter referred to as "New Zealand Report"), paras. 50-52, at 29. These two reports are considered *infra*, Appendix 2, secs. 4 and 5.

[26] Australian Working Paper, *supra*, note 9, para. 2.79, at 63.

[27] Davis, *Administrative Law Treatise* (2d ed., 1983), Vol. 4, §24:2, at 211-14.

[28] Australian Report, *supra*, note 18, Draft Bill, s. 8(2). The report canvassed a number of other possible verbal formulae, including "special interest", "injury in fact", "sufficient interest", "real concern", and the option of "any person", all designed to implement open standing in "public interest" litigation (*ibid.*, paras. 235-51, at 128-38). It rejected all of them for a number of reasons, from too restrictive ("special interest") to too unrestricted ("any person") (*ibid.*, paras. 236 and 251, at 129-30 and 137). At one point, it also discussed the option of denying standing only to "busybodies", but rejected this possibility for the following reasons (*ibid.*, para. 215, at 118):

> All that is being said is that it is inappropriate to confer rights of standing on one who is acting improperly in commencing the proceedings. The way is open for judicial subjectivity.

The Commission thus fastened upon the phrase "merely meddling" to guide courts (*ibid.*, para. 252, at 138). While acknowledging that the phrase is "very similar to that of 'mere busybody' ", it asserted, without further comment, that "merely meddling" is "not precisely the same" (*ibid.*).

interests ought to be protected, although this is not the *necessary* implication of such formulae. But they do not assist in the determination of which interests should qualify; they do not give the court any direction.

The most extreme illustration of a simple verbal formula that provides no direction to the courts is, of course, one that simply uses the term "interest".[29] But, in our view, formulae modified by adjectives such as "genuine", "sufficient" or "real" accomplish little more.

For example, a statutory provision that standing should be granted unless the plaintiff has no "real concern" or no "genuine interest" in the subject matter of the litigation could be interpreted in any number of ways. What does no "real concern" mean? Is it to be contrasted with an unreal, or only perceived, concern? What it does *not* mean can be clarified, as indicated earlier, by stating that a suit is not barred only because the plaintiff is not advancing a personal, proprietary, or pecuniary interest, and some of the attempts at reform do make this critically important point. But what does this phrase, and other similar phrases, signify beyond this, and how are courts to give them meaning and apply them to the wide range of situations that can be raised in litigation?

Would courts read these formulae as precluding *any* differentiation among various types of interest? Would interests in legality alone be counted as "real" and "genuine"? For example, would someone who had only witnessed a motor vehicle accident and who has an abhorrence of motor vehicle negligence, but who has not been otherwise injured, be allowed to sue for a declaration that the driver was negligent? The prevention of motor vehicle negligence clearly, and justifiably, is of significant concern to many people. At one level, then, this concern or interest may be "real" and "genuine". But should it be sufficient for granting standing in the circumstances just described?

Conversely, would the courts read "real" and "genuine" restrictively so that, despite directions that an invasion of a personal, proprietary or pecuniary right is not a prerequisite to standing, they recognize few other interests, fearful of the potential open-endedness and lack of structure of the terms "real" and "genuine"?[30] For example, would they avoid recognizing other worthy interests where those who have traditional legal interests are capable of suing but decline to do so? Consider the example of a school principal who is fired by a schoolboard.[31] The principal can sue for unjust dismissal, but for his own

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[29] See, for example, the *Municipal Act*, R.S.O. 1980, c. 302, s. 139(1), which entitles a resident of a municipality or a "person interested in a by-law" to apply to the court to have the by-law quashed for illegality. See, generally, Rogers, *The Law of Canadian Municipal Corporations* (2d ed., 1971), Vol. 2, §191.3, at 989 *et seq*.

[30] It bears mentioning here that in *Finlay*, *supra*, note 17, the "genuine interest" test had been met since Finlay had complained that he had been financially prejudiced by the alleged failure of the Province to comply with the Canada Assistance Plan. In other words, Finlay had a personal, pecuniary interest.

[31] See *Re Ratepayers of the School District of New Ross Consolidated School* (1979), 36 N.S.R. (2d) 434, 102 D.L.R. (3d) 486 (S.C., T.D.).

reasons declines to do so. The parents' association, concerned about the broader impact of the dismissal as a reflection of schoolboard policy, brings an application to review the legality of his firing. Would a court conclude that, because the principal is the most directly affected (in a traditional sense), he alone has the requisite "genuine" or "real" interest? Or would the court recognize the parents' wider interest in schoolboard policy?

The problem, of course, is that simple verbal formulae, by their very nature, do not sufficiently direct the court one way or the other. Neither extreme, described above, would likely predominate: courts would not interpret the formula so broadly as to let all interests litigate, or so restrictively that almost any interest other than traditional legal ones would be rejected. To what extent, then, do verbal formulae provide guidance to the courts under such circumstances? How do courts decide among interests that are plausible, but not clear, candidates for recognition? How do courts make important distinctions as the interests move from those that are regarded as vague and inchoate to those that are more clearly defined and, therefore, more likely to be recognized?

While the Commission has already stated its belief that, as a matter of general principle, it is inimical to our system of justice that someone with no interest, or at most a very trivial interest, in the outcome of litigation, whether private or public, should be permitted to bring a defendant into court to answer a complaint, we recognize that the vexing question is how to define "no interest" or "trivial interest". And, as we have said, the same question arises, for example, in respect of a "real" or "genuine" interest. But verbal formulae alone cannot answer this question. They convey far too little information. They do not explain what factors the court should take into account and how it should evaluate them as it makes its decision. In other words, they ignore the *process* of rational decision-making.

The rationale of the English Law Commission in recommending a "sufficient interest" test was that a legislated formula should allow for judicial development, without being so precise as to impose rigidity.[32] This reason,

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[32] The majority of the New Zealand Public and Administrative Law Reform Committee adopted the rationale of the English Report, *supra*, note 25: see, generally, *infra*, Appendix 2, sec. 5(c). It adopted, as well, the English formula, except that it made it permissive, allowing the court to refuse relief for lack of a sufficient interest, rather than requiring a showing of such interest by the plaintiff. However, the minority of the New Zealand Committee was concerned that the test proposed by the majority would fail to clarify the uncertain field of standing. Specifically, it was of the view that guidelines or criteria were needed as to the meaning of "sufficient". See *supra*, note 25, minority report, paras. 3-5, at 36, and, generally, *infra*, Appendix 2, sec. 5(d).

The Australian Law Reform Commission, in its Working Paper, recognized the need to create a test that was flexible, but that would give some guidance to the courts: *supra*, note 9, paras. 2.71 *et seq.*, at 59 *et seq*. However, in our view, the Working Paper failed to achieve this goal. It rejected the English formula of "sufficient interest" because it did not clearly indicate a legislative intention to widen standing. It preferred a test focusing on "matters of real concern to the plaintiff": *ibid.*, para. 2.80, at 63-64. However, it bears emphasizing that, in the Working Paper, the Australian Commission did not seem altogether sanguine respecting its proposed test, since it commented that the test "would appear to be as good as any": *ibid.*

however, addresses only part of what we consider to be the appropriate process by which standing decisions are made. We do require flexibility and room for case-by-case development and we should, of course, avoid rigidity. But we must balance this against the need to provide the courts with as much direction as possible under the circumstances; that is why we envisage the enactment of some statutory guidance concerning the criteria to be utilized by the courts in determining questions of standing. The Commission is firmly of the view that this guidance can be made compatible with, and therefore need not be provided at the expense of, flexibility and ongoing judicial development of the law.

## 3. PROPOSALS FOR REFORM

### (a) Introduction

In the preceding discussion, and in chapter 3 of this report, the Commission argued that the existing law, preoccupied as it is with the notion of a claimant's "interest", as well as the proposals of other law reform bodies, also focusing on essentially interest-based tests, are fundamentally flawed, both conceptually and as a matter of practice. The existing and suggested rules either clearly preclude certain meritorious actions from proceeding or "[contribute] nothing to the discussion of which . . . cases ought to be granted access" to the courts.[33] Interest-based standing rules, however framed, are "too vague to provide any real guidance" and do "little to point a court toward a result consistent with the reasons for the existence of" these rules.[34] Moreover, by directing the court's attention solely to the plaintiff's "interest", or to the nature of the plaintiff's relationship to the issue in the litigation, the rules divert attention from many other critical considerations, such as the effect of the litigation on persons not before the court.

Finally, we agree with the proposition that "the interest-based tests achieve nothing other than to give the Court a virtually unfettered discretion while providing no guidance how to exercise it".[35] By concentrating on seemingly clear categories into which plaintiffs must fit in order for standing to be granted, the true nature of what is being decided, and the process for reaching decisions, are obscured and, as a result, are either distorted or ignored.

The Commission's proposals for reform attempt to address these crucial matters by removing the vague and arbitrary categorizations and focusing on what we consider to be the essential features of how courts make decisions respecting standing.

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[33] Cromwell, *supra*, note 1, at 174.

[34] *Ibid.*, at 166.

[35] *Ibid.*, at 202.

## (b) The Proposed Standing Regime

### (i) Introduction

The Commission has already recommended that no proceeding should be dismissed and no pleading struck out only on the ground that the person bringing the proceeding has no personal, proprietary, or pecuniary interest in the remedy sought or has suffered or may suffer injury or harm of the same kind or to the same degree as other persons. By accepting the notion that some type of vetting by the courts should take place, we have rejected the option of open standing, whether applicable to all civil litigation or only to particular categories of litigation.

Before turning to the details of our proposed standing regime, we wish to raise two important introductory issues. The first concerns the connection between the concept of cause of action and the concept of standing, having regard to what courts really do when they deal with a defendant's challenge to a plaintiff's entitlement to sue. The second pertains to the nature and scope of the court's discretion when it seeks to resolve a dispute about standing.

#### *a. Cause of Action and Standing*

In the previous section of this chapter, the Commission concluded that exclusively interest-based regimes fail to recognize the essential dynamic of the decision-making process involved in determining matters of standing. As we pointed out in chapter 3,[36] existing law essentially asks the wrong questions and so, in its general focus on traditional legal interests, it receives what for us are the wrong answers. Consequently, certain critically important issues, and therefore those persons seeking to advance such issues, have remained outside the adjudicative process.

Any new test to be proposed by the Commission must guide courts to make decisions that are consistent with the legitimate rationalia of standing rules. Moreover, the test must be animated by a recognition of what courts really do when they make standing decisions. The Commission believes that, in deciding questions of standing in any type of civil proceeding, courts essentially determine whether a particular claim or interest, advocated by a particular plaintiff, should be recognized as worthy of protection by, and therefore deserving of advancement in, the courts.

In our view, it is critical for the law of standing to recognize a broadened array of interests. In order to do so, courts must necessarily become sensitive to the existence and implications of various values in our society—values that have dramatically altered from the time when the public nuisance rule first developed. Focusing on normative values will permit courts to utilize decision-

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[36] *Supra*, ch. 3, sec. 2(c).

making tools that further a serious consideration of potentially novel kinds of interest and a sensitivity to the place of such interests in various contexts. Courts need to abandon tools to the extent that they promote the notion that standing decisions are made according to rigid rules, and in a sort of normative vacuum.

Reflecting on the circumstances and situations where standing issues have arisen or will likely arise suggests that there is no single factor, no one element, that should invariably lead to the grant or denial of standing in any particular case. Instead, as we shall see below,[37] it is sensitivity to the existence of a variety of factors, and a sophisticated evaluation and balancing of them, that we believe should lie at the heart of the court's decision-making process.

This is not easy or uncontroversial. Deciding which interests to recognize and for what purposes is a complex and sensitive task, one in which courts are always actively engaged, whether explicitly recognized or not. By granting standing, a court indicates that it is prepared to place a certain value on an interest and to protect it by allowing it to be the subject of litigation, and that the individual or group seeking to litigate is not disputing something of, for example, merely idiosyncratic interest. One commentator has described the process in this way: "What we need to attend to is separating out interests sincerely held, but which nevertheless are too embryonic or too idiosyncratic, from those which represent a common interest of sufficient importance to merit the law's protection."[38]

This process, in our view, links the notion of standing and the notion of cause of action[39] at the theoretical, and certainly at the practical, level. Both concepts essentially involve asking the same questions. Accordingly, whether or not courts explicitly acknowledge the link — and whether they use the term "standing" or "cause of action" — the process of decision-making in respect of both "private" and "public" litigation does not, in fact, "keep the recognition of rights and standing as separate exercises".[40] Courts do focus, in effect.

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37 *Infra*, this ch., sec. 3(b)(iii).

38 Bogart, *supra*, note 4, at 6.

39 Not, however, the notion of justiciability, which can be clearly distinguished from both standing and cause of action. See the General Introduction to this report.

40 Bogart, "The Lessons of Liberalized Standing?: A Review Essay of Cromwell's *Locus Standi*", Osgoode Hall L.J., forthcoming, at 10. After noting that Cromwell, *supra*, note 1, at 149, is of the view that "[t]he process of how the courts 'recognize' common law and equitable rights is beyond the scope of this work", Bogart stated (at 11):

> But I think that how courts recognize rights and any evaluation of that process is at the very heart of the problem we have called standing.
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> For example, unlike Professor Cromwell, I see no need to differentiate so clearly between cause of action and standing. In a strong discussion he shows how most questions of standing, on the one hand, and causes of action, on the other, could be viewed as interchangeable, indicating, for example, how the classic *Donoghue* v. *Stevenson* could be seen as an issue of standing. He insists, however, that we should not

on the normative values underlying any determination of standing (and therefore, cause of action) and do not in practice make decisions that reflect a rigid dichotomy between who should be permitted to proceed and what claims, whether traditional or otherwise, should be recognized. We believe this is the correct approach for all types of civil litigation — a rational and principled approach to the issue of entitlement to seek relief in the courts under the rubric of standing or cause of action. One commentator has put the matter in this way:[41]

> Toward the end of his judgment in *Finlay* Le Dain J., in responding to an argument of the defendant that even if Finlay had standing the proceedings should nonetheless be struck out because the plaintiff still had no cause of action, made a brief but critical observation:
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> > I question whether there is a true issue of reasonable cause of action distinguishable, as an alternative issue from that of standing . . . . Clearly, if a plaintiff has the requisite standing an action will lie for a declaration that an administrative authority has acted without statutory authority.

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do this because '[i]f the definition of standing includes such issues, it fails to isolate a set of legal issues concerned solely with access to adjudication that may be usefully analyzed as a unit' [*supra*, note 1, at 208]. But of course that is precisely the point. If we acknowledge there is no reliable point of divide between 'public' and 'private', that interests of many characteristics can deserve the law's protection then standing as a sealed unit does and should break down because there is no sustainable reason to keep it separate and apart.

See, also, Australian Report, *supra*, note 18, para. 33, at 18-19:

> 33. *'Merger' of Standing with Cause of Action*. The theoretical explanation for this virtual absence of questions of standing from proceedings to enforce purely private rights is that the legal principles establishing these rights confer a right of action and an appropriate remedy on the plaintiff in a way which makes it clear that the plaintiff, and the plaintiff alone, is the appropriate person to sue:
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> > In the classical lawsuit, the standing problem could hardly arise. The issue was whether the particular plaintiff was entitled to the (usually compensatory) relief demanded from the particular defendant, when both plaintiff and defendant were private persons. The question of plaintiff's standing to sue merged with the question whether plaintiff had stated a cause of action on the merits.
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> [Chayes, "The Supreme Court: 1981 Term — Foreword: Public Law Litigation and the Burger Court" (1982), 96 Harv. L. Rev. 4, at 8-9.]
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> . . .
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> In [the] examples [given in para. 33, at 19], a separate issue of standing does not arise because the law does not countenance the possibility that a person, not possessed of a legal right, should be able to institute civil proceedings to claim the remedy attaching to that right.

The Australian Report also cited (at 18, *n*. 38) Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief" (1974), 83 Yale L.J. 425, at 439-40, and Vining, *Legal Identity*[:] *The Coming of Age of Public Law* (1978), at 43-45.

[41] Bogart, "Understanding Standing, Chapter IV: Minister of Finance of Canada v. Finlay" (1988), 10 Supreme Ct. L. Rev. 377, at 396-97.

> This is important because it indicates that recognizing someone's standing and founding a cause of action are closely related processes, that there is no clear line of division between different kinds of interest and that the recognition of any interest is grounded in a common process—the law's pronouncement about which values it will enhance and protect.

The regime that we propose in this report is intended to, and will, deal fully and adequately with what courts and commentators have hitherto called either "cause of action" or "standing" (although, as indicated in the General Introduction, for convenience we use only the latter term throughout this report). In the end, then, we believe that cause of action and standing are sufficiently intertwined and co-extensive, if not identical, to warrant their continued assimilation in practice by the courts.

The assimilation of these two concepts—which, as we have said, is a feature of existing practice in all civil proceedings—is reflected in the manner in which a plaintiff's entitlement to commence and maintain a proceeding is challenged. In Ontario, there is no discrete rule permitting a challenge on the basis of "standing". However, rule 21.01(1)(b) of the Rules of Civil Procedure[42] provides for motions "to strike out a pleading on the ground that it discloses no reasonable cause of action . . .". Notwithstanding this terminology, it is clear that where a defendant wishes to challenge the plaintiff's "standing", he may wish to proceed under this rule.[43]

It is, we believe, critically important to understand the essential nature of the defendant's attack on the plaintiff's right to commence and maintain an action, and to emphasize that no change in principle or practice is intended to be made by the proposals set forth in this report. Whether this view of the practical effect of our recommendations requires the amendment of any rule, or of any other provision, is a matter we leave to the appropriate authority.

### *b. The Court's Discretion*

For the purposes of our new statutory regime, it would be impossible to determine with complete precision and in advance all normative values, and therefore all interests, that merit judicial recognition in individual cases. However, the Commission can articulate certain values and interests that we believe are of fundamental importance. For example, at the heart of this report is a firmly held belief that access to the courts must be given to a wider range of

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[42] O. Reg. 560/84.

[43] In *Dumont v. Attorney General of Canada*, [1988] 5 W.W.R. 193, 52 D.L.R. (4th) 25 (Man. C.A.), the defendant argued, among other things, that the statement of claim disclosed no reasonable cause of action and that the plaintiffs had no standing to claim relief. However, both the majority of the court and O'Sullivan J.A., in dissent, effectively subsumed standing under cause of action; neither discussed these questions as two separate topics.

claims, having regard to the interests of society as well as to the interests of those individuals who are directly, or indirectly, concerned. To be able to respond adequately to the advancement of new and hitherto unknown claims under a more liberal standing regime, courts must necessarily be permitted a substantial degree of discretion—not unfettered discretion, but discretion informed, as noted in the preceding passage, by "an awareness and articulation of the fundamental process". The discretion must not be so loose and ill-defined as to legitimize virtually *any* result, but must be guided or structured in a principled manner. A justification for judicial discretion in respect of standing decisions has been advanced in the following way:[44]

> The most promising vehicle for reform is increased judicial discretion with respect to standing. In other words, the proposal advanced here is that the discretionary approach of *Thorson* should be applied more generally. The creation of a discretion acknowledges the obvious point that it is difficult to enunciate a fixed test for standing that is capable of reasonably precise application and yet likely to yield satisfactory and consistent results. Judicial discretion may be exercised purposively, that is, in light of the purposes for which the discretion is granted. The discretion would be given in order to permit the courts to limit standing in accordance with the rationalia that support such limitations. A court exercising judicial discretion can weigh the applicability of these rationalia in light of the particular circumstances of the case. And, as Laskin J. remarked in *Thorson*, as standing relates to the 'effectiveness of process', it is particularly suitable for judicial discretion. Moreover such an approach would not make the law any less certain as most presently accepted standing tests provide little other than a *de facto* discretion. Interest based tests, for example, are so imprecise and open-ended that the courts seeking to apply them have a wide range of permissible outcomes available. As a final point, the discretionary approach is, as a result of *Thorson*, a familiar one in some types of standing questions so that its more general adoption should not require a massive overhaul of judicial thinking.

As a matter of principle, the Commission endorses this view of judicial discretion. We do not see in judicial discretion—or at least the type to be recommended below—the opportunity for unfettered, purely subjective, decision-making. Rather, we believe that judicial discretion is a vital, essential component of any standing regime designed to serve the purposes for which it is established.

As we have said, we shall propose express statutory guidance for the courts, for without such guidance courts would be cut loose from their moorings, without any indication of the direction they are to go. Merely removing one monolith—for example, traditional legal interests—will not necessarily deter its replacement by another. Therefore, courts must not simply be left with the impression that some other single value is now to be recognized as predominant. However, in the end we assume judicial good faith and good sense in interpreting the new rules in the liberal manner advocated in this report and reflected in the proposed legislation.

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[44] Cromwell, *supra*, note 1, at 211-12. See, also, Bogart, *supra*, note 4, at 6: "With all the hazards involved, we are dependant on judges for this enterprise".

### (ii) The Burden of Proof

At present, the burden of satisfying the court that the plaintiff does not have standing rests on the defendant challenging the plaintiff's right to proceed. The New Zealand Report would retain existing law, putting the onus squarely on the defendant; its draft section provides that the court "may refuse relief to the applicant [for judicial review] if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates". The New Zealand Report rejected, then, the formulation propounded by the English Law Commission, which would require the plaintiff to show that she did, in fact, have a sufficient interest.[45]

We believe that it is important for the new standing legislation to deal expressly with the question of onus in the context of a liberalized discretionary regime. The Commission sees no reason to overturn the existing principle that the plaintiff's standing is presumed. In our view, the onus should remain on the defendant to challenge that status. Accordingly, we recommend that legislation should provide that every person is entitled to commence and maintain a proceeding unless a party challenging such a right satisfies the court that their exist factors against proceeding that outweigh the factors in favour of proceeding.[46]

### (iii) The Test for Standing

#### *a. General*

We now turn to the details of the statutory discretionary standing regime that we propose. In creating such a regime, under which standing is to be given to a wider variety of interests, we must answer a critical question, namely, "When would we ever want to refuse standing?" Legislation must be able to assist courts to identify those circumstances in which there is sufficient reason—having regard to certain yardsticks, described later in this chapter—to refuse access to the judicial system.

In the Introduction to this chapter, the Commission argued that, in determining questions of standing, courts are essentially engaged in a process of acknowledging and granting access to the courts to a variety of interests. This process reflects certain value judgments respecting what kinds of interest "deserve" recognition. In making standing decisions, courts must necessarily consider and weigh a number of factors. It is this interactive process, which lies at the heart of such decision-making, that we seek to make manifest by appropriate legislation. A properly conceived statutory standing test can give courts as much guidance as possible, and thereby point courts in the right direction when they are faced with standing issues, without distorting or oversimplifying this process.

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45 See New Zealand Report, *supra*, note 25, Draft Bill, s. 56D(1), and English Report, *supra*, note 25, Draft Bill, s. 1(3).

46 Draft Act, s. 2(1).

Accordingly, the Commission recommends the adoption of a discretionary regime in which, as a matter of principle (and having regard to the more detailed proposals made below), courts should be required by statute to evaluate all the factors both for and against conferring on a plaintiff the right to commence and maintain a proceeding.[47] The court's evaluation of these factors will allow it to determine whether the interests against the conferral of such a right outweigh the interests in favour of it.

The Commission would, however, go further than simply requiring the courts to evaluate all the relevant factors for and against the granting of standing. While this basic direction to the courts would be an acknowledgment generally of what they are doing when they determine questions of standing, we believe that more guidance can and should, in fact, be given on the more difficult and controversial issue concerning precisely what factors (and, therefore, what values or interests) ought to be considered.

The Commission wishes to reiterate its view that not all factors are necessarily relevant in any one case. Indeed, as we shall see, some will clearly be inapplicable in certain situations. Nor will the factors be accorded the same weight even when all of them appear to be relevant in the same case. The factors will arise in varying configurations and weights and will influence each other differently, depending on the context. This process is, then, a dynamic one, but in no way does it detract from the requirement of judicial evaluation and balancing that underlies the type of discretionary regime we recommend.

In order, therefore, to provide further texture to the Commission's proposed discretionary regime, the Commission recommends the statutory adoption of a list of factors that the court should be required to consider in determining whether the interests against the plaintiff's right to sue outweigh the interests in favour of this right. As we shall see later in this chapter, the list would be expressly non-exhaustive, so that it would remain open to the court to take into account any other factor if it thinks it appropriate to do so.

We turn now to a discussion of the specific factors that the Commission believes ought expressly to form part of the proposed new statutory test for standing.

### *b. Factors to be Considered by the Court*

#### *(1) Whether the Issue is Trivial*

The Commission has considered whether the triviality or importance of the issue raised in the litigation should be listed expressly in the new statute as a factor for the court to consider. Our general conclusion that this matter should be so listed is animated by our belief, expressed earlier, that not all interests have a legitimate claim to be protected in the courts. Scarce judicial and other

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[47] *Ibid.*, s. 2(2).

resources may well compel certain individuals to seek redress for trivial harm in some other way. Indeed, under certain circumstances it may not be possible to obtain what is believed to be adequate satisfaction.

But even assuming, as we do, that as a general principle the notion of triviality or importance should be expressly included in the proposed list of factors, it may be argued that this factor may well be insensitive to the nature of litigation involving personal, proprietary, and pecuniary interests. That is, this factor may unwittingly endanger existing access rights enjoyed by persons with traditional legal interests, but whose litigation raises issues that may be regarded as trivial or unimportant.

In reforming the law of standing, one of our fundamental goals has been to eliminate the need for litigants to advance traditional legal interests. We do not wish to diminish the rights of those who possess such interests, at least on the basis of the triviality of the issues raised in the litigation. The possibility that the inclusion of triviality or importance as a factor may contribute to this result is sufficient reason to address the matter expressly in the new legislation.

Accordingly, the Commission recommends that, in determining whether the factors against the plaintiff proceeding outweigh the factors in favour of proceeding, the court should be required to consider whether the issues raised in the proceeding are trivial, but the court should be directed to consider this factor only where the interest of the plaintiff is not personal, proprietary, or pecuniary.[48]

It should be noted that the Commission has focused on the "triviality", rather than the "importance", of the issues raised. Our concern is that the listing of "importance" as a factor may lead some courts to establish too high a standard. Some may interpret this particular term to require overwhelming national or regional importance or very imminent or widespread danger or harm. It seems that, in this respect, the focus on "importance" is more problematic than the focus on "triviality".

We do not propose to define the term "trivial". We recognize that determining what is trivial involves a value judgment on the part of the court. But the acknowledgment that deciding the question of standing necessarily involves the making of value judgments is precisely what is required of any rational decision-making.

### *(2) Number of People Affected*

This factor is closely related to the preceding one. It is, of course, clear that an issue may not be trivial even if it affects only a limited number of people. For example, a tort or breach of contract may affect only one person other than the wrongdoer, or environmental damage may be caused to only a small area. However, the more people affected by an issue the more likely it is to be perceived as an issue that raises important and broadly-based, so-called "public interest", issues.

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[48] *Ibid.*, s. 2(2)(a)(i).

For example, standing for constitutional challenges is aided by the fact that an issue raising such questions will, by its nature, affect many people, if not all of society, in some way. When Mr. McNeil challenged the authority of the Nova Scotia Board of Censors, he could raise his own interest in being denied the opportunity to view movies of his choice; but he also could point to the fact that many other citizens were denied that right.

Conversely, the fact that only one person is immediately affected by the alleged illegality may militate against standing, particularly if the issue raised is otherwise regarded as trivial. Consider the following example in the context of judicial review. Applicant A seeks a building permit and is unlawfully refused by B, the building inspector. After negotiation, A is content to obtain a building permit for another location in the city. C, someone with an abhorrence of the refusal by public officials to do their duty, brings an application for a declaration that the building inspector should have issued the building permit.

Where B's refusal is an isolated breach of his duty, directly affecting A alone, it seems difficult to argue in favour of standing. The reason is not that C has no interest, because we can appreciate his distaste for illegal conduct on the part of public officials. However, this distaste seems too vague and abstract to justify litigation in the context of the particular case. Furthermore, the person most directly and immediately affected by the refusal, the applicant, has settled the matter in a way satisfactory to her. She would like to have no interest in the lawsuit and might indeed actively oppose it.

However, we may well be more disposed to granting C standing where B's refusal of a building permit is part of a longstanding and continuing pattern of illegal behaviour. In this case, where many more people are directly and indirectly affected, C's abhorrence of B's conduct may be sufficient to outweigh A's apparent indifference.

The Commission has come to the conclusion and, accordingly, recommends that, in determining the question of the plaintiff's right to commence and maintain a proceeding, the court should be required to consider the number of people affected in any way by the issues raised in the proceeding, whether personally or otherwise. However, in order to ensure that plaintiffs with traditional legal interests are not denied standing simply because, as frequently will be the case, the litigation will involve few persons, we recommend that the court should have regard to the question of how many people are affected only where the interest of the plaintiff is not personal, proprietary, or pecuniary.[49]

We wish to make two further comments concerning the factor proposed above. First, it will be observed that our proposal refers to the number of people affected, whether "personally or otherwise". Had we simply used the word "affected", it might have raised a critical question concerning what was meant. That is, it might have brought us back to the present state of the law, with its focus on exclusively traditional legal interests.

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[49] *Ibid.*, s. 2(2)(a)(ii).

Second, it should be noted that the Commission's formulation refers to the number of people affected "personally". This is not inconsistent with our recommendation, made earlier, that a person should not be refused standing because that person has, for example, no "personal" interest in the remedy sought. The reason that there is no conflict between the two proposals is that the recommended provision would state that the plaintiff should not be refused standing "only" for this reason. This is, of course, to overcome the generally rigid existing view of the courts in this regard. However, it does not mean that whether a person is personally affected should not be a factor for the courts to consider in reaching a decision.

### *(3) Immunization of Issues from Review*

The Commission has considered whether, in determining a plaintiff's standing, the court should be required expressly to take into account the fact that the issues sought to be raised in the litigation will be effectively immunized from review if the plaintiff is denied standing. This factor is derived from the liberalized test adopted by the Supreme Court of Canada in *Borowski*[50] and *Thorson*,[51] where it was intended to favour a grant of standing in appropriate circumstances.

In *Borowski*, which involved an attack on the constitutionality of the abortion provisions of the *Criminal Code*,[52] the court stated that standing should be granted in part because there was "no other reasonable and effective manner" in which the issue could be tried, since those most directly involved either would not want, or would be unable, to challenge the provisions. In the *Thorson* case, the court spoke in terms of "whether a question of constitutionality should be immunized from judicial review". The court's decision to grant standing was influenced by the fact that the *Official Languages Act*,[53] the impugned legislation, imposed no duties upon specific individuals and did not create any offence or penalty for its infringement. Thus, it was unlikely that any individual would meet the test for standing under the public nuisance rule.

In chapter 3,[54] the Commission examined in some detail, and criticized, the portion of the *Borowski* test just mentioned. For example, we argued that the plaintiff faced certain practical difficulties in attempting to prove that "no other reasonable and effective manner" actually exists. We questioned what standard would apply in such cases, and we noted the speculative and uncertain nature of the inquiry before the court.

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50 *Supra*, note 17.

51 *Supra*, note 17.

52 R.S.C. 1970, c. C-34. See, now, R.S.C. 1985, c. C-46.

53 R.S.C. 1970, c. O-2. See, now, R.S.C. 1985, c. O-3.

54 *Supra*, ch. 3, sec. 3.

The Commission does not resile from these criticisms. However, it must be emphasized that they were made in a different context. The criticisms were levelled against what the Supreme Court of Canada said was a *test* in respect of standing; that is, in order to be granted standing, the plaintiff had to prove that, if it were denied, the issues sought to be litigated would be immunized from any effective review. But the question before us now is a different one. It is not whether immunization from review ought to be an indispensable component of a test that a prospective plaintiff must pass before he is entitled to commence and maintain a proceeding. Rather, the question is whether, in determining a plaintiff's standing, the court should be required to take this factor into account along with the other factors recommended in this chapter.

However trenchant our critique of the immunization factor in the context of the discussion in chapter 3, it necessarily has much less force in the present context, where the immunization factor is not intended to be dispositive. Each factor to which we subscribe must be evaluated and weighed against other relevant factors.

In some instances, the effect of the immunization factor would be neutralized, at least from the perspective of the plaintiff. For example, in a case like *McNeil*, it would clearly not be possible for the plaintiff to argue that there are no, or few, other persons who would be willing to shoulder the burden of the type of litigation he initiated. Indeed, in *McNeil* there were in fact others who had a more direct interest in the issues involved in the litigation. In such a case, therefore, the immunization factor would not assist the plaintiff.[55] In other cases, however—and *Borowski* is as good an illustration as any—the immunization factor would be far more favourable to the plaintiff. The plaintiff may well be able to press the argument before the court that, in all probability, she alone is the only one wishing to pursue a matter of public importance.

The Commission wishes to re-emphasize its observation that the question whether the court should take immunization into account as but one factor among many is not the same as the question whether a plaintiff should be required in all cases to prove that no other effective means exist to have the issues resolved. Immunization need not be given pre-eminence. Indeed, it should be clear that, despite our belief in a liberalized standing regime, we do not subscribe to the view that a plaintiff should be accorded standing *simply* because the issues he wishes to raise would not otherwise be litigated. The fact that some question of law will not be put before a court should not, in itself, be determinative. As we have said before, some matters must necessarily remain outside the adjudicative process.

We do, however, believe that a plaintiff should be entitled to argue that, for example, an issue of public importance would likely be left unresolved if

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55 We recognize that, in a case like *McNeil*, the defendant would attempt to use the immunization factor as a sword to challenge the plaintiff's standing. However, this factor would be no more, or less, determinative in bolstering the defendant's attack than it would be, as in the *Borowski* type of case, in advancing the plaintiff's claim. In every instance, the court would be required to look at *all* relevant factors.

standing were denied. For us, the relevance and importance of this factor are, in principle, beyond dispute. Accordingly, the Commission recommends that, in deciding whether or not a person has the right to commence and maintain a proceeding, the court should be required to consider whether or not another reasonable and effective method exists to raise the issues that are sought to be litigated.[56]

### *(4) Other Proceedings Against the Defendant*

Earlier in this chapter and in chapter 3,[57] the Commission considered the issue whether a legitimate rationale for retaining a standing rule is the prevention of an unwarranted multiplicity of proceedings arising from the same allegedly wrongful conduct. We concluded that, in large measure, the courts now have, through such devices as joinder, consolidation, and stay of proceedings, for example, the means of dealing adequately with this concern. However, while we sought to de-emphasize the importance of this rationale by putting it in its proper perspective, we did acknowledge that a new liberalized standing regime would inevitably—and, in our view, justifiably—grant access to the courts to a much wider segment of the community, thereby increasing the likelihood that parallel proceedings will be initiated against the same defendant.

Let us suppose, then, that at the time of the proceedings in which the plaintiff's right to sue is being challenged, other proceedings, raising some or all of the same issues of fact or law or both, have already been initiated. What role, if any, should the initial proceedings play in the court's decision whether or not to accord the plaintiff standing? Should the Commission's proposed statutory standing regime expressly require the courts to take this issue into consideration?

In order to respond to these questions, reference should be made again to the "immunization" factor isolated by the Supreme Court of Canada in *Borowski* and *Thorson*[58] and recommended by the Commission in the preceding section for express inclusion in its proposed list of factors.

Having regard to the concern raised in *Borowski* and *Thorson* and by the Commission, we have come to the conclusion that it would not be desirable to remain silent on the question whether the court should be directed expressly to take into account the existence of proceedings against the same defendant, arising from the same conduct. We fear that silence might lead a court to reject a plaintiff's standing, even when there are compelling reasons for granting standing, simply on the ground that another proceeding has been initiated against the defendant that raises the same issues. This may be the result because, if the legislation is silent, the courts may conclude that, if someone else is litigating

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[56] Draft Act, s. 2(2)(d).

[57] *Supra*, this ch., sec. 1, and ch. 3, secs. 2(b)(ii)a and 2(c)(i)a.

[58] *Supra*, note 17.

the issue, it is not then "immunized" and, therefore, there is no need to grant the plaintiff standing.

Accordingly, we recommend that, in determining whether the factors against proceeding with the plaintiff's action outweigh the factors in favour, the court should consider whether another proceeding has been instituted against the same defendant, raising issues of fact or law or both that are also present in the proceeding that is opposed, if the interests of the plaintiff can be met by intervening in the other proceeding and it is reasonable to expect the plaintiff to do so.[59]

It will be observed that the possibility of intervention has been expressly built into the preceding factor. It is our belief that, if in fact intervention in the initial proceedings could adequately accommodate the interests in favour of standing (in the proceedings where standing is in question) and it would be reasonable to expect the plaintiff to do so, under these circumstances the existence of the initial proceedings would be a relevant, although not controlling, factor against standing. In all other instances—that is, where intervention is not possible or practicable—the existence of other proceedings should be irrelevant and the court should look to other factors in deciding whether to grant or refuse standing.

As we indicated earlier, there are other procedural devices that are now available to coordinate the disposition of parallel proceedings. We wish to make it clear that there would be nothing to prevent the court from considering the utility of these other devices in a particular context and determining, for example, that, although intervention would fully meet the interests seeking to litigate separately and it would be reasonable to expect the plaintiff to intervene, the reasons to grant standing are persuasive and any multiplicity problems could be handled more efficaciously by these other procedures.

Some examples of how the proposed factor could be used by the court would be helpful. The clearest illustration might occur where more than one plaintiff with a non-traditional legal interest commences proceedings. For example, let us assume that Energy Probe initiates proceedings and then the Canadian Environmental Law Association commences subsequent proceedings, both involving the same conduct of the same defendant and raising the same issues. A court, after analyzing the lawsuits, could (but would not be bound to) deny standing to the Canadian Environmental Law Association on the basis that its interests could be adequately met by intervening in the litigation brought by Energy Probe.

Another example is where a cottage owner has initiated litigation seeking damages for injury done to her cottage because of the polluting activity of the defendant. Now suppose a canoeist (or some environmental association, with the legal capacity to sue) commences an action concerning pollution of the same water system by the same activity of the same defendant, but the subsequent lawsuit asks for injunctive relief. If it is apparent that the plaintiff in the

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[59] Draft Act, s. 2(2)(b). With respect to intervention, see *infra*, ch. 5.

subsequent proceedings could intervene and argue the points of fact or law or both raised in the initial lawsuit, this would favour rejection of standing. Such intervention might depend on the scope of the issues raised by the plaintiff in the initial lawsuit, whether the initial lawsuit could be expanded to allow the claim for injunctive relief, and the stage to which the initial lawsuit had progressed.

In some cases, intervention would be possible, but it might be unreasonable to expect the plaintiff in the subsequent litigation to intervene. Suppose that similar factual or legal claims in respect of pollution against the same defendant are contained in an initial lawsuit in Ottawa and a subsequent one in Pembroke. It may not be reasonable (because of distance and cost, for example) to expect the plaintiff in Pembroke to involve herself in a lawsuit in Ottawa even if her interests could otherwise be accommodated satisfactorily by intervening in the Ottawa proceedings.

Once again, we wish to emphasize that if, for some sufficient reason, intervention in the initial proceedings will not adequately deal with the issues raised in the subsequent proceedings, or if it is not reasonable to expect the plaintiff in the subsequent proceedings to intervene, the fact that such proceedings have been initiated should never, by itself, be a reason to deny standing. The Commission readily acknowledges that this may mean the existence of more lawsuits. However, that is a problem often faced by defendants when their conduct affects many people. Moreover, as we have pointed out before, the mere fact that there will be an increased volume of litigation is not, in our view, a valid justification for preserving the existing state of the law. Rather, we must be attentive to the legitimate aspirations of those persons, and especially those persons advancing non-traditional claims, who seek access to the judicial process.

### *(5) Fairness to Persons Whose Interests are Against the Litigation*

Earlier in this chapter, and in chapter 3,[60] the Commission discussed the important issue of fairness as it relates to the interests of persons other than the defendant and to the question of discouraging "busybodies".[61] Indeed, the fairness factor may be said to be one of the main reasons for rejecting the principle of open standing.

In light of this discussion, the Commission has considered whether the court, in arriving at a decision respecting standing, should be directed to take account of the interests of all persons who are against the continuation of the

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[60] *Supra*, this ch., sec. 1, and ch. 3, sec. 2(c)(i)c.

[61] See Bogart, *supra*, note 41, at 392: "[I]f the 'avoidance of busybodies' is understood as a concern for the relationship of the interests who may wish to sue and those who are not suing but who may nevertheless be affected by the litigation, this factor is . . . highly relevant".

litigation (that is, both defendants and third parties) and to evaluate such interests in relation to the interests favouring standing. In addition, we have examined whether the legislation should also provide that a plaintiff shall not necessarily be denied standing only because some interests not before the court—particularly those that are personal, proprietary, or pecuniary—are or might be affected by the litigation. We have concluded that these matters ought to be specifically considered by the court. Accordingly, we recommend that, in determining the question whether the plaintiff is entitled to commence and maintain a proceeding, the court should be required by statute to consider whether to proceed would be unfair to persons affected. For the reasons set out below, we further recommend that the fact that the outcome of the proceeding affects or may affect a person whose interest is personal, proprietary, or pecuniary should not necessarily be considered unfair.[62]

The import of this factor should not be misunderstood. In this connection, reference should be made to the doctrinal squabbles in American case law about the ability of a plaintiff to assert the interests of others not before the court. This has been used to defeat some claims.[63] It is for this reason that the Commission has specifically considered whether the proposed new standing legislation should provide that a plaintiff shall not be refused standing merely because, by means of his action, he advances the interests of others not before the court.

A person can be taken to raise the interests of third persons in two different ways.[64] She may invoke the interests of others as part of one's own claim or she may assert a right actually belonging to others. However, the cases frequently fail to distinguish between these two situations. When focusing upon fairness to third parties, we too must be careful not to confuse the two. In our view, it is not necessarily unfair to third parties to allow a plaintiff to raise issues that may involve—in a sense, incidentally—the interests of others or the conferring of benefits on them.[65]

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[62] Draft Act, s. 2(2)(c).

[63] See, for example, *Warth v. Seldin*, 422 U.S. 490 (1975).

[64] See Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief" (1974), 83 Yale L.J. 425, at 465-69.

[65] See Cromwell, *supra*, note 1, at 216:

> It seems likely that in some cases in which standing is disputed, the impact of the ultimate decision on the merits will extend well beyond the parties to the suit. For practical purposes, the rights of many may be determined without their participation either through the principles of *res judicata* or of *stare decisis*. This danger is somewhat reduced by requiring the Court to be satisfied that the presentation of the issues will be adequate and by allowing the Court to refuse standing where there is some more obvious plaintiff.

The Commission has concluded that the adequacy of the presentation of the issues ought not to be specifically dealt with as a factor in our proposed standing test. The "more obvious plaintiff" point is considered below.

With respect to the factor under consideration, two further points should be mentioned. First, it is important for the court to be sensitive to the ability of those most directly affected to complain of the wrongdoing and seek redress in some meaningful way. The fact that such persons have not launched a suit should not be a barrier to the plaintiff's standing where, for example, they are simply unable to do so in any practical sense.

Second, a court must consider the motives of persons most directly affected in tolerating the wrong. It may be that those most affected have a specific motive for not complaining. They may even have benefited from the initial wrong. In such a case, it would be anomalous to insulate the wrong from judicial scrutiny on the ground that the persons most affected do not wish to pursue any legal claim they may have. On the other hand, it may be perfectly acceptable, for example, for the person most affected to reach a settlement of her claim, in which case it is difficult to see why her decision should not be respected.

The Commission agrees, then, with the observation that "[a] judicial pronouncement on a problem is not always and everywhere desirable: there is an area of choice for those most directly involved in a dispute that needs to be respected".[66] On the other hand, in some cases much more is involved than merely the interests of those most directly affected. We are reminded of the argument, made earlier, against the notion that there is a rigid dichotomy between "public" and "private" interests. In this connection, one commentator has said that "'[p]rivate' disputes often house 'public' values, interests that transcend the predelictions of those who seem most affected".[67] The difficulty for the courts is discerning when this occurs in individual cases.

The preceding discussion has focused on unfairness in relation to third persons who are not before the court. But it should be noted that another interest ranged against the litigation, and that also would be taken into account by the proposed factor, is that of the defendant.

At first blush, this may seem both obvious and uninstructive. After all, why should the court not consider this interest? What person would ever want to be sued?

The Commission does, however, wish to emphasize two points. First, the defendant's interest against the litigation, even if always, or almost always, present, is nevertheless a factor that has to be overcome before any proceeding should be allowed to go forward. In some circumstances, the reasons for authorizing the litigation can be so weak that the defendant's interest in being left alone should prevail.

Second, in addition to the constant and general interest of defendants against litigation, it may be that a defendant can present arguments against specific

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[66] Bogart, *supra*, note 41, at 392.

[67] *Ibid.*

litigation that raise particular reasons why she should not be exposed to the proceedings. The unfairness factor proposed by the Commission would allow the defendant to make those arguments and would empower the court to take them into account. One illustration might be where a plaintiff launches proceedings against a defendant that raise issues and questions that have already been litigated on the merits or dealt with under a settlement. For example, the doctrine of *res judicata* would not apply against the plaintiff in the second lawsuit. Moreover, the plaintiff in that lawsuit would not be bound by any settlement made in the first proceedings.

However, we believe that it would be appropriate for a court to take account of a prior lawsuit that dealt with issues sought to be litigated by the plaintiff. In allowing the court to consider the effect of prior proceedings, one does not have to subscribe to arguments raising the spectre of floodgates, or a threat of an unmanageable multiplicity of proceedings, if standing is liberalized. We have already argued that these fears are ill-founded. Nevertheless, this factor acknowledges that the defendant's resistance to being sued repeatedly when that *actually* occurs is a factor that should be taken into account by the court in deciding whether or not to grant standing. Here the defendant would have to demonstrate that the previous litigation did address adequately the issues sought to be raised in the subsequent proceedings and that this fact outweighs the reasons advanced by the plaintiff in favour of standing.[68]

For example, in a case involving pollution of a water system it may be legitimate for a defendant to argue that a canoeist should not be allowed to proceed with her action where a previous suit, raising the same allegations of pollution and requesting the same remedies, has already been litigated unsuccessfully by a cottage owner. On the other hand, let us assume that the cottage owner's prior suit was successful, but damages alone were claimed and received. If the canoeist believes that only injunctive relief will adequately protect the water system, and if, for example, the canoeist satisfactorily explains why she did not or could not intervene in the cottage owner's suit, the fact that the defendant will be exposed to another lawsuit may not be sufficient to deny standing.

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[68] We note that other law reform agencies have simply dismissed the fear of multiple lawsuits as a reason against liberalizing standing and have not attempted to deal with its presence in a specific instance as a reason against granting standing in that case.

See, for example, the British Columbia Report, *supra*, note 1, at 59 *et seq*. That report's comment on the threat of multiple suits in particular circumstances is as follows (*ibid.*, at 60): "Even if the courts were to be faced with multiple proceedings, they can always penalize such litigation with costs, or strike the matter out as being vexatious". The costs sanction does not seem adequate because, to the extent it is a solution at all, it comes too late in the proceedings: the defendant is still exposed to an entire lawsuit. Nor are the subsequent proceedings vexatious in the sense that they are unfounded.

But see s. 5 of the Michigan Environmental Protection Act, P.A. 1970, No. 127 (Mich. Comp. Laws Ann. §691.1205 (West 1987)), s.s.(3) of which states that "[t]he doctrines of collateral estoppel and *res judicata* may be applied by the court to prevent multiplicity of suits". The statute does not, however, give any guidance concerning the circumstances under which this should be done.

### *(6) Other Factors*

In the course of considering the scheme that ought to supplant the existing one, the Commission has favoured a broad, liberal approach and has avoided the use of blunt instruments to deal with difficult and complex issues. We have attempted to indicate what courts are really doing, or what they should be doing, when they determine whether or not a person has standing. Our conclusion was that, subject to certain exceptions,[69] the existing provincial law of standing ought to be abolished, to be replaced by a new regime that would direct the court to balance the factors in favour of, and against, the plaintiff's right to sue, having regard to certain factors to be set forth in the proposed legislation.

We believe that the type of regime that we have proposed thus far, and particularly the specific factors to which reference has been made, will be sensitive to the interests of all persons affected by the litigation. The question that now remains is whether the specific list of factors that has been recommended should be regarded as exhaustive. Are there other important factors that merit express inclusion in the Commission's proposed legislation? In the course of the court's deliberations in a particular case, should the court be attentive to other factors not expressly mentioned in the legislation?

Based on the literature, the Commission has considered whether, for example, the need for a "concrete" factual picture (to avoid adjudication on hypothetical or abstract questions) and for "adequate representation" (in order to ensure skilled and determined advocacy) ought to be represented as express factors to be considered by the court in deciding standing challenges in specific cases. In the context of "public interest" litigation, the Australian Law Reform Commission Report, for example, recommended that a person with no "personal stake" in the litigation should be granted standing if his "manner of presenting the issues" reflects a capacity or willingness "to represent the public interest adequately in conducting the case".[70] And, as well, a leading commentator has said that the court should "assure itself . . . that the parties will adequately present the pros and cons of the issues raised in" the litigation.[71]

We do not, however, recommend adequacy of representation for inclusion as a specific factor in the proposed legislation. Leaving aside the fact that no such scrutiny exists where a plaintiff has a traditional legal interest, even though she may raise issues that are of so-called "public" concern, and the fact that the existence of adequate representation is, in any event, by no means easily determined, there are very few examples among the prominent cases on standing where these concerns have, in fact, been said to be a problem.[72]

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[69] *Infra*, this ch., sec. 3(c).

[70] Australian Report, *supra*, note 18, para. 253, at 138, and *ibid.*, Draft Bill, s. 8(5).

[71] Cromwell, *supra*, note 1, at 215.

[72] Even the Australian Report appears to be unsure whether such cases really exist: *supra*, note 18, para. 211, at 116-17, and para. 253, at 138.

As for a lack of a concrete factual record, this is addressed by normal procedural and evidentiary rules. It is the responsibility of the parties to articulate the issues and present an adequate factual record. The danger that any evidentiary inadequacy will not be discovered until trial exists equally in traditional cases. That danger is, we believe, minimal. There is nothing to gain by the inclusion of this factor and it may imply that broadly-based, non-traditional suits are particularly suspect and, indeed, to be feared.

Yet, notwithstanding our beiief that the matters discussed above should not form part of the Commission's proposed list of factors, we are of the view that this list should not be regarded as exhaustive. Indeed, the court might well wish to consider concreteness and adequacy of representation where these matters are relevant in the circumstances. As we said earlier, there is a need for the court to have at its disposal a flexible statutory scheme with appropriate guidelines. We simply cannot define in advance all possible situations and, therefore, all possible factors that ought to be taken into account in order for the court to make a reasoned decision. Accordingly, we recommend that, in addition to the requirement that the court consider, where applicable, the specific factors proposed earlier in this chapter, the court should be empowered to consider any other factor that it considers just.[73]

### (iv) Timing of the Decision on Standing

As we noted earlier,[74] although a defendant may bring a motion to challenge a plaintiff's right to commence and maintain a proceeding as soon as the proceeding is launched, the court has the discretion to defer the issue for consideration with the merits of the case. Accordingly, the timing of the standing decision depends upon the exercise of judicial discretion. In this section, we consider the appropriateness of this position.

At present, most standing decisions are made before the hearing on the merits. A legal rule that would alter this practice by requiring the question of standing to be determined together with the merits of the case would have both advantages and disadvantages for each of the parties. For example, a plaintiff would be saved the expense and delay of a preliminary challenge to her standing, and would avoid the risk that the merits of her case might never be heard. On the other hand, increased uncertainty respecting the plaintiff's entitlement to a remedy would continue to the end of the proceeding. A defendant, by contrast, would be prevented from eliminating a tenuous claim early in the proceeding, and would be unable, therefore, to avoid the cost of defending the action. However, the defendant's challenge to standing would be argued with the full legal

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[73] See the closing flush of Draft Act, s. 2(2).

[74] See *supra*, ch. 2, sec. 6. We wish to re-emphasize, in the context of timing, the essential similarity between, if not identity of, standing and cause of action (see *supra*, this ch., sec. 3(b)(i)a). Therefore, not surprisingly, where the courts deal with a defendant's motion to strike on the basis that the plaintiff's pleadings do not disclose a reasonable "cause of action", there arise the same timing issues as those described below.

and factual context before the court, perhaps strengthening her challenge to the plaintiff's status.

A legal rule that would require the question of the plaintiff's right to sue to be determined as a preliminary matter would have a reverse set of advantages and disadvantages. For example, a successful plaintiff would have one of the uncertainties respecting her ultimate entitlement to a remedy resolved at an early stage in the proceeding. As a practical matter, however, she would have accomplished very little else. In essence, she would have been put to the expense and delay of a preliminary challenge, merely to secure the right to continue her action. In addition, even though successful, the plaintiff might be caused further delay by the defendant's decision to appeal. Moreover, a meritorious claim, brought by a serious plaintiff, might be defeated entirely by a preliminary challenge to standing. On the other hand, a successful defendant would be able to eliminate a tenuous claim early in the proceeding, thereby saving the expense and trouble of defending the action through the trial.

The apparent logic of a rule requiring standing to be determined as a preliminary matter, and, conversely, the ultimate inappropriateness of such a rule in some cases, have been addressed in the Australian Report as follows:[75]

> In one sense, it is logical to treat the question of standing as a preliminary issue, which should precede the consideration of the action on its merits. If the plaintiff has no standing, the substantive issue need not be considered and a great deal of court time and expense may be saved. However, it is an over-simplification to assume that this is always the best approach. A premature ruling on standing in a complex case may be a 'false economy'.

In our view, a determination of entitlement to standing might involve an assessment of a number of complex issues, many of which go to the merits. This does not mean, however, that the Commission would countenance a rule requiring standing to be considered with the merits in all cases. While such an approach might be appropriate in certain circumstances, in other cases, where the interests weighing against the litigation are clear, it might be appropriate that standing should be determined as a preliminary matter. We agree with the conclusion reached in the Australian Report[76] that, although a rule requiring standing to be determined exclusively as a preliminary matter, or exclusively with the merits, would have the advantages of ease and uniformity of application, such a rule would be inadvisable because it would not be sufficiently sensitive to the specific circumstances of each case.

We therefore have concluded that, as a matter of principle, in order to accommodate the particular circumstances of each case, the timing of the standing decision should remain a matter of judicial discretion. Accordingly, the Commission recommends that, subject to what is said below, the present law respecting the entitlement of a defendant to bring a motion to challenge the plaintiff's

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[75] Australian Report, *supra*, note 18, para. 128, at 69-70.

[76] *Ibid.*, para. 262, at 142.

right to commence and maintain a proceeding, and the discretion of the court to defer the issue for consideration until after the hearing of the merits, should be retained.[77]

We have further concluded, however, that the intimate nexus between a plaintiff's right to sue and the court's decision on the merits requires that there should be a presumption that the two should be determined together. Accordingly, the Commission recommends that, on a motion challenging a person's right to commence and maintain a proceeding, the court should be required to defer the issue for consideration until after the hearing of the merits, unless the court is satisfied that, in the particular circumstances of the case, it is desirable that standing should be determined at an earlier time.[78]

Not only is this presumption consistent theoretically with the broader standing regime proposed in this report, but it would reduce substantially what, in our view, are certain inequalities of treatment inherent in the present procedure. For example, a decision adverse to the defendant on the motion merely means that the matter will proceed to a hearing on the merits, at which stage the defendant may still succeed. By contrast, a decision adverse to the plaintiff on the motion will be final and binding, unless the plaintiff is able to obtain leave to appeal, and unless he succeeds on that appeal. This assumes, of course, that the plaintiff has the personal resources to finance an appeal. An individual plaintiff seeking to litigate a matter of public concern might be obliged to abandon the

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[77] Draft Act, s. 3(1). See *Minister of Finance of Canada v. Finlay*, *supra*, note 17, at 328, and Borowski II, *supra*, note 17, at 2.

[78] *Ibid.* This is similar to the recommendation in the Australian Report, *supra*, note 18, para. 262, at 142-43.

See Evans, "Developments in Administrative Law: The 1986-87 Term" (1988), 10 Supreme Ct. L. Rev. 1, at 16:

> The breadth of the court's discretion, and the range of factors to be considered strongly suggest that it will generally be unwise to deny a person standing as a preliminary issue, before the 'merits' of the substantive claim are examined.

See, also, *ibid.*, at 18-19 (emphasis in original):

> However, it is suggested that the *normal* rule should be that a court will not entertain a preliminary motion to strike a statement of claim or motion on the ground that the plaintiff or applicant lacks standing to litigate an allegation that a public authority has acted unlawfully.
>
> The desirability of not fragmenting a case into a series of questions for decision that may each be the subject of appeal, the existence of disputed questions of fact upon which standing may depend, the blurring of the line dividing analysis of the 'substantive' issues pertaining to the respondents' legal powers and duties and the applicant's standing, and the apparently 'technical' nature of the standing issue, all militate in favour of a court not deciding standing as a preliminary question.
>
> The courts' power to dismiss litigation summarily for lack of standing should be reserved for those rare instances where the plaintiff lacks even an arguable case that she has sufficient interest in the litigation to justify invoking judicial intervention.

litigation upon the first adverse decision, as a result of the additional costs associated with the appeal procedure. Thus, an adverse decision on the preliminary motion has a more profound effect on the interests of the plaintiff than it does on those of the defendant. The presumption proposed above would tend to reduce the effect of this disparity.

Finally, the Commission recommends that, on a preliminary motion challenging the plaintiff's right to commence and maintain a proceeding, a decision of the court to adjourn the issue for consideration until after the hearing of the merits should not be appealable.[79] In the absence of such a rule, where the motion is unsuccessful, there is no practical way to prevent the defendant from appealing, or at least filing and arguing an application for leave to appeal, merely for the purpose of causing further delay and expense. Indeed, the resources of defendants ordinarily involved in public interest litigation will often permit them to appeal any adverse decision. Our recommendation would minimize any tactical advantage that might be gained by a defendant by challenging the plaintiff's right to sue by way of an appeal.

### (c) The Effect of Other Relevant Provincial Legislation

Specific provincial statutes and regulations may, by clear language, confer standing, or a cause of action, where a plaintiff's status to litigate may not otherwise be recognized, or may be questioned. For example, the *Municipal Act*[80] authorizes a "resident" to bring an application to have a by-law quashed for illegality. Another example is the *Planning Act*,[81] which authorizes, in certain instances, a municipality or adjoining municipality, or a ratepayer of any such municipality or adjoining municipality, to bring an action to restrain contravention of certain planning by-laws, Ministry orders, or sections of the *Planning Act*. Presumably, such express provisions are intended by the Legislature to be dispositive with respect to the question of entitlement to commence and maintain a proceeding.

In many cases, however, the attempt to uncover the Legislature's intent is a difficult exercise. Not surprisingly, many provisions confer standing or a cause of action only implicitly. In other instances, the Legislature may not have considered the matter at all, or there may be no single legislative intent.

Earlier in this chapter, the Commission recommended the enactment of a section in the proposed *Access to Courts Act* reflecting the principle that that Act should be read so as to increase access to the courts by granting a right to sue to many persons who now would not have such a right.[82] The purpose of the Act

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[79] Draft Act, s. 3(2).

[80] *Supra*, note 29, s. 139(1). With respect to the right of a "person interested in a by-law" to apply to the court to have it quashed, see *supra*, note 29, and accompanying text.

[81] R.S.O. 1980, c. 379, s. 50.

[82] *Supra*, this ch., sec. 1.

is not, however, to deny a right to sue to those who would have this right under existing legislation. Accordingly, the Commission recommends the enactment of a section in the proposed *Access to Courts Act* to the effect that the provisions for the commencement and maintenance of a proceeding in that Act are in addition to, and not in derogation of, any right to commence and maintain a proceeding that is conferred by or under any other Act.[83] In other words, both our Act and any other legislation conferring standing or a cause of action would coexist. A person who for some reason cannot invoke the provisions of that legislation could attempt to commence and maintain her proceeding under the proposed *Access to Courts Act*.

### (d) The Application of the Proposed Standing Legislation to Constitutional Challenges

The Commission entertains no doubt that, as a general principle, the Province of Ontario has, under paragraphs 13 and 14 of section 92 of the *Constitution Act, 1867*,[84] legislative authority to enact standing rules applicable to civil proceedings brought in Ontario courts. However, the more difficult question is whether there are constitutional limitations on the extent to which the province can enact standing legislation applicable to constitutional challenges, whether such challenges involve the validity of provincial or federal legislation or the *Canadian Charter of Rights and Freedoms*.[85]

While the province cannot alter or derogate from rights created or conferred by valid federal legislation, we believe that the Commission's standing regime, if enacted, could (with one exception) properly be applied in constitutional litigation, even where, as noted above, the litigation deals with the validity of federal or provincial legislation or is based on an alleged violation of the Charter. This is not to say that *any* provincial standing legislation would be constitutionally acceptable. For example, it would appear that provincial legislation could not validly deprive a provincial superior court of that irreducible minimum of jurisdiction to review matters on constitutional or jurisdictional

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[83] Draft Act, s. 2(5).

[84] 30 & 31 Vict., c. 3 (U.K.). (See R.S.C. 1985, App. II, No. 5.) Paragraphs 13 and 14 permit the provinces to legislate in respect of:

> 13.—Property and Civil Rights in the Province.
>
> 14.—The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[85] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

grounds.[86] But prevailing constitutional principles do not, we believe, preclude the type of remedial legislation we have proposed. Moreover, our statute would *expand* the right to standing, so that the rule that legislation cannot *curtail* access to provincial superior courts in constitutional matters[87] would clearly not be infringed. Jurisdiction and procedure in the provincial courts is, in general, a matter of provincial concern, and it has never been suggested that provincial laws that facilitate or augment that jurisdiction do not apply to constitutional cases.

We indicated above that our view concerning the constitutional validity of our standing test in constitutional litigation is subject to one exception. Whereas section 52 of the Charter, dealing with declaratory relief, does not contain its own standing rule, section 24 of the Charter is more comprehensive in this respect. Section 24(1) reads as follows:

> 24.—(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 24(1), then, expressly requires an infringement of Charter rights in order for it to be invoked. That being the case, it is not, of course, competent for the province to expand the reach of section 24(1) by making our broader standing test apply to it.

However, it seems clear that, whatever the ambit of section 24(1), it does not define exhaustively the situations in which constitutional litigation can arise.[88] Remedies other than those envisaged by section 24(1) are available, and, under orthodox constitutional principles, our test would be applicable in respect of litigation seeking such remedies. Therefore, where, for example, section 52 of the Charter is invoked, the Commission's standing rules would, if enacted, supersede the principles enunciated in the Supreme Court of Canada's constitutional trilogy of *Thorson*, *McNeil* and *Borowski*,[89] which now govern declarations of invalidity under that section,[90] in the same way as our new standing rules would supersede the trilogy in other types of constitutional challenge.[91]

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[86] See, for example, *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1.

[87] The cases turn on the interpretation given to s. 96 of the *Constitution Act, 1867*, *supra*, note 84.

[88] See Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 694.

[89] *Supra*, note 17.

[90] See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, and Borowski II, *supra*, note 17, at 24. See, also, Cromwell, *supra*, note 1, at 102.

[91] With respect to ss. 24(1) and 52 of the Charter, see *supra*, ch. 2, sec. 4.

# CHAPTER 5

# INTERVENTION

## 1. INTRODUCTION

To this point, we have addressed the issue of standing to sue and have made recommendations based on our view that access to the courts should be expanded through the introduction of a liberalized standing regime. However, obtaining standing to initiate proceedings is not the only way by which a person may gain access to the courts in civil proceedings in Ontario; one may also participate by intervening in proceedings initiated by other parties. The concept of intervention,[1] the subject of this chapter, concerns the ability of strangers (that is, non-parties) to participate, at their request or upon the invitation of the court, in existing civil proceedings.[2]

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[1] Also known as "standing to intervene". In this chapter, except as noted *infra*, this ch., sec. 4(b) (where the present law and reform proposals in Australia are discussed), intervention embraces both intervention as a party and as *amicus curiae* (friend of the court).

For a similar classification, see Muldoon and Scriven, "Intervention as Added Party: Rule 13 of the Ontario Rules of Civil Procedure" (1985), 6 Advocates' Q. 129 (hereinafter referred to as "Muldoon and Scriven 1"), at 131-32. See, also, *Sixty-Seventh Report of the Law Reform Committee of South Australia to the Attorney General, Relating to the Law Governing Locus Standi—Non-Party Interventions and Amicus Curiae in Relation to Proceedings in Civil Jurisdiction* (1982) (hereinafter referred to as "South Australia Report"), at 4-5.

Others regard intervention and *amicus curiae* as mutually exclusive concepts: see Welch, "No Room at the Top: Interest Group Intervenors and *Charter* Litigation in the Supreme Court of Canada" (1985), 43 U. Toronto Fac. L. Rev. 204, at 205, *n.* 1; Bryden, "Public Interest Intervention in the Courts" (1987), 66 Can. Bar Rev. 490, at 494-96, and 499; Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985) (hereinafter referred to as "Australian Report"), para. 7, at 5 and para. 273, at 148; *Attorney-General of Canada v. Aluminum Co. of Canada* (1987), 35 D.L.R. (4th) 495, at 505, 10 B.C.L.R. (2d) 371 (C.A.); and Edwards, *The Attorney General, Politics, and the Public Interest* (1984), at 154.

For a discussion of the conceptual difficulty in relating intervention to friend of the court, see Scriven and Muldoon, "Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1985), 6 Advocates' Q. 448 (hereinafter referred to as "Scriven and Muldoon 2"), at 451.

[2] This chapter does not examine the measures by which a party to a proceeding can secure the participation of a non-party. Nor does it examine interventions in the context of administrative and quasi-judicial tribunals, public inquiries and coroners' inquests. Interventions in criminal proceedings, and judicial reviews of criminal proceedings, also do not fall within the ambit of this chapter, although it should be noted that the intervention regime under examination here can be applied to "[p]roceedings in criminal matters by way of *certiorari*, *mandamus* and prohibition". See Ontario Supreme Court Rules Respecting Criminal Proceedings - Part I, SI/85-152, r. 2(1).

It is because standing and intervention are related, although distinct, aspects of the larger question of access to justice that we feel it necessary to consider intervention in this report. In our view, it would be philosophically and logically inconsistent to provide broad access to the courts through a liberalized standing regime while at the same time restricting access through intervention.[3] It seems to us that, on principle, the policies and rules governing the intervention regime in Ontario should be broadly analogous to those governing the proposed standing regime.

Moreover, the proposed standing rules may in fact increase the importance of access through intervention. While issues of wide consequence can arise in the context of a purely private dispute involving traditional legal interests,[4] litigation involving non-traditional legal interests, which will be particularly facilitated by our proposed standing rules, can, by its nature, implicate many varied and "diffuse"[5] interests. The greater the numbers of persons that may be affected by the outcome of a proceeding, the greater the likelihood that there will be many different, often contradictory or conflicting, views of what constitutes the "public interest", and of what principle or policy should govern the resolution of the issues raised by the litigation.

Intervention can promote better informed, and more acceptable, satisfactory decision-making, by ensuring that the court is fully armed with all relevant information and viewpoints from a spectrum of implicated interests. Intervention can be an effective mechanism for ensuring pluralistic participation, providing the court with an opportunity for a fuller appreciation of the consequences of the questions before it, and of the broader impact of the principles it is about to shape.

It can also be an important means of facilitating access to justice for many citizens, particularly interest groups advancing non-traditional interests, who may be unable to initiate litigation due to the expense, or who wish to seek to address a single issue arising in the context of more complex litigation. Finally, intervention, used in a flexible and creative manner, can promote efficiency and certainty in the administration of justice, by preventing multiplicitous proceedings and possibly inconsistent results.

However, like standing, intervention requires a balancing of the various interests of the parties involved in, or potentially affected by, the outcome of a

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[3] See Swan, "Intervention and *Amicus Curiae* Status in Charter Litigation", in Sharpe (ed.), *Charter Litigation* (1987) 27, at 28.

[4] For example, the division of pensions as family assets, under the *Family Law Act, 1986*, S.O. 1986, c. 5, may arise in the context of a divorce proceeding, but the principle established could have broad social as well as legal implications. See, generally, Chayes, "The Role of the Judge in Public Law Litigation" (1975-76), 89 Harv. L. Rev. 1281.

[5] For a discussion of non-traditional or "diffuse" interests in the context of litigation, see Cappelletti and Garth, "The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation", in Habscheid (ed.), *Effectiveness of Judicial Protection and the Constitutional Order* (1983), at 117. See, also, MacKay, "Judging and Equality: For Whom Does the Charter Toll?" in *Charter Watch[:] Reflection on Equality* 35, at 52-53 ((1986), 10 Dalhousie L.J.).

proceeding. Traditionally, the common law courts have shown a reluctance to allow broad intervention by non-parties. This reluctance is explicable partly because intervention conflicts with a major tenet of civil litigation, that is, party control of proceedings and definition of issues. A related concern is that of fairness to the original parties who may be prejudiced by extra expense and delay if third parties are allowed to intervene. Less clearly articulated concerns about intervention echo those encountered with respect to standing, such as fears about the court becoming a political forum, or being flooded with applications for intervention in every imaginable case. Questions are also raised about the capacity of the courts to recognize and define non-traditional, often diffuse, interests, or to determine who best represents those interests.[6]

In this chapter, we shall consider what should be the appropriate resolution of the tension that intervention creates between the rights and expectations of existing parties to a proceeding and the needs and potential contribution of third party intervenors. We shall examine intervention in Ontario, as well as the intervention regimes and proposed regimes of some other jurisdictions. We shall then turn to our conclusions and our views on whether reform of the present law is required.

## 2. INTERVENTION UNDER RULE 13

### (a) Introduction

In Ontario, intervention in civil proceedings is governed mainly by Rule 13,[7] introduced in 1984 as part of the Rules of Civil Procedure.[8] Rule 13 provides:

> 13.01(1)—Where a person who is not a party to a proceeding claims,
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> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between him or her and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding,
>
> the person may move for leave to intervene as an added party.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding

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[6] See, generally, Shapiro, "Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators" (1968), 81 Harv. L. Rev. 721, and Gellhorn, "Public Participation in Administrative Proceedings" (1972), 81 Yale L.J. 359.

[7] With respect to specific statutory and common law intervention apart from R. 13, see *infra*, this ch., sec. 3.

[8] O. Reg. 560/84, as am. by O. Reg. 221/86.

and the court may add the person as a party to the proceeding and may make such order as is just.

13.02—Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

13.03(1)—Leave to intervene as an added party or as a friend of the court in the Divisional Court may be granted by a panel of the court, the Chief Justice of the High Court, the Associate Chief Justice of the High Court or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

Rule 13 represents a departure from intervention under the former Rules of Practice,[9] in that it provides for the first time a general and structured approach to intervention by non-parties in an existing lawsuit.[10] As discussed below, formerly intervention in proceedings other than an appeal[11] had been allowed by courts based on a combination of the inherent jurisdiction of the courts to control their own proceedings and the rules governing joinder of parties.[12] As under the former practice, intervention by any person under Rule 13 remains at the discretion of the court. However, as indicated, the exercise of that discretion is now more formally structured. Under rule 13.01, a prospective party intervenor must satisfy the court that she has met one or more of the three threshold tests discussed below. Where this threshold requirement has been satisfied, the court is directed to consider the effect of the intervention on the existing parties in deciding whether to grant the motion.

Rule 13 is a flexible procedure that allows the court to fashion intervention in a way that is both appropriate to the proceedings and fair to the existing parties.[13] In this connection, the court may grant party intervenors the full rights of any party, or it may limit their participation with respect to specified procedures or issues.

Before considering intervention under Rule 13 in more detail, we should point out that, to date, there is little case law to indicate whether the Ontario courts have adopted, or will adopt, a liberal or a restrictive approach to intervention. While there is some indication that the courts may take a broad and

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9 R.R.O. 1980, Reg. 540.

10 Watson and McGowan, *Ontario Supreme and District Court Practice 1987* (1986), at xi-xii.

11 Former R. 504a provided for intervention upon appeal. See discussion *infra*, this ch., sec. 2(b)(i).

12 Watson and McGowan, *supra*, note 10, at xi-xii.

13 See *infra*, this ch., sec. 2(b)(iv).

innovative view of their power to grant intervention,[14] the limited evolution of the case law makes much of the following discussion necessarily speculative. Nevertheless, it seems fair to say, as one commentator has suggested, that "Rule 13 really embodies a number of features of the law prior to its enactment while at the same time breaking new ground by bestowing novel intervention rights".[15]

Rule 13 provides for two distinct kinds of intervention. We turn first to discuss intervention as an added party and, in the following section, discuss intervention as a friend of the court.

### (b) Intervention as an Added Party

#### (i) Background: Joinder and Intervention on an Appeal

Before examining intervention as an added party under Rule 13, it is necessary to discuss two vehicles under the former Rules of Practice[16] that had been used to secure intervention, since to a certain extent they continue to be referred to in Rule 13 proceedings.[17] The first of these vehicles is former Rule 136, the joinder rule, which allowed the court to order that "any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action", be added as a party.

As we have indicated, courts have traditionally shown a reluctance to allow broad intervention by non-parties. Intervention under the joinder rule was initially limited to cases where a proposed intervenor could demonstrate a "direct interest" in the litigation. The term "direct interest" was given a restrictive interpretation, generally limiting intervention to cases where the applicant had a proprietary interest in the subject matter of the dispute, or where he could be legally affected by the outcome.[18] Gradually, however, the courts in Ontario began to relax slightly the "direct interest" requirement, particularly in the municipal planning context, where intervention was granted on the basis of an applicant's "legitimate and substantial interest" or "very real interest".[19]

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[14] See the comment of Steele J. in *Hansen v. Royal Insurance Co.* (1985), 52 O.R. (2d) 755, at 758, 23 D.L.R. (4th) 29 (H.C.J.). See, also, Muldoon and Scriven 1, *supra*, note 1, at 145-46.

[15] Muldoon and Scriven 1, *supra*, note 1, at 146.

[16] *Supra*, note 9.

[17] See the discussion *infra*, this ch., sec. 2(b)(ii).

[18] Muldoon and Scriven 1, *supra*, note 1, at 140-41, citing *Re Ronark Developments and City of Hamilton* (1974), 4 O.R. (2d) 195 (Div. Ct.), aff'd on consent (1974), 5 O.R. (2d) 136 (C.A.); *Re Orangeville Highlands Ltd. and Township of Mono* (1974), 5 O.R. (2d) 266 (Div. Ct.); and *McDonald's Restaurants of Canada Ltd. v. Corporation of the Borough of Etobicoke* (1977), 5 C.P.C. 55 (Ont. Div. Ct.).

[19] *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1975), 7 O.R. (2d) 717, 50 D.L.R. (3d) 58 (Div. Ct.). See, generally, *Re Ontario Securities Commission*

Unfortunately, the court did not elaborate on what would constitute these apparently broader, but equally vague, "interests".

The courts also began to allow intervention where an applicant could establish a "commercial" interest,[20] adopting the approach of English cases granting intervention where a dispute would "directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill".[21]

However, even where a court was otherwise prepared to recognize that a proposed intervenor had a sufficient "interest", pre-Rule 13 intervention was often denied on two other grounds: (1) that the intervention would "broaden the lis" by introducing new issues or causes of action; or (2) that the interest of the intervenor was "adequately represented" by one or other of the original parties to the proceedings.[22] The combination of these two notions imposed significant constraints on proposed intervenors. On the one hand, if they sought to address issues raised by the original parties, the court could take the view that their interests would be adequately represented by the parties, and therefore the intervention was unnecessary.[23] On the other hand, if the proposed intervenor attempted to raise concerns or issues other than those defined by the original parties, or even to offer alternative perspectives on the issues originally raised, intervention could be refused on the ground that the litigation was being broadened to the prejudice of the original parties. As a result, access to the courts by way of the joinder rule was very limited.

Rule 504a of the former Rules of Practice,[24] was the other pre-Rule 13 intervention vehicle. Rule 504a was the first formal intervention rule in Ontario, providing for discretionary intervention by "any person interested in an

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(1983), 44 O.R. (2d) 61 (C.A.); *Pershadsingh v. Pershadsingh* (1984), 46 C.P.C. 143; and *Re Damien* (1976), 12 O.R. (2d) 262 (Div. Ct.).

20 *Re Starr and Township of Puslinch* (1976), 12 O.R. (2d) 40 (Div. Ct.); and *Johnson v. Corp. of Town of Milton (No. 1)* (1981), 34 O.R. (2d) 289, 24 C.P.C. 205 (H.C.J.). See, also, *McDonald's Restaurants of Canada Ltd. v. Corporation of the Borough of Etobicoke*, *supra*, note 18, *per* Van Camp J., diss'g.

21 *Gurtner v. Circuit*, [1968] 2 Q.B. 587, at 595, [1968] 1 All E.R. 328 (C.A.).

22 See, for example, *Re Clark and the Attorney General of Canada* (1977), 17 O.R. (2d) 593, 81 D.L.R. (3d) 33 (H.C.) (subsequent reference is to 17 O.R. (2d)) where the court stated (at 598):

> Subject to statutory or Court-made rules, it is my view that interventions *amici curiae* should be restricted to those cases in which the Court is clearly in need of assistance because there is a failure to present the issues (as, for example, where one side of the argument has not been presented to the Court). Where the intervention would only serve to widen the *lis* between the parties or introduce a new cause of action, the intervention should not be allowed.

23 For a discussion of the notion of "adequacy of representation", see Welch, *supra*, note 1, at 211-12, and Swan, *supra*, note 3, at 29.

24 Rule 504a, which was introduced in 1979, and was superseded by R. 13 of the Rules of Civil Procedure, did not preclude interventions under the joinder rule.

appeal".[25] There were only three reported cases that considered Rule 504a,[26] leaving the question of who was an "interested" person largely unanswered. In *Re Schofield and the Minister of Consumer and Commercial Relations*,[27] the Court of Appeal indicated that having an interest in a common issue of law or fact would be insufficient.[28] However, it appears that the requisite interest could be broader than a "direct" interest. In *Re Schofield*, without enunciating any general interest test, Thorson J.A. observed:[29]

> [O]ne can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facets of the appeal which ought to be considered by the Court in reaching its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

Despite the apparently liberal *dicta* of Thorson J.A. in *Re Schofield*, in *Re Mannion (No. 2)*,[30] leave to intervene was denied to the Ontario Status of Women Council, which claimed to represent the interests of women from a broader perspective than that of the immediate parties. However, the particular facts of that case make it difficult to derive any general principle with respect to when intervention would be granted under Rule 504a.

The court in *Re Schofield* was divided on whether the issue of "adequacy of representation" should be a factor in granting intervention. Wilson J.A. denied a proposed intervention on the basis that the applicant's interest was adequately represented by an original party.[31] However, Thorson J.A. disagreed that adequacy of representation should be a factor.[32] He was concerned that consideration of

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[25] The Attorney General had enjoyed certain statutory rights of intervention prior to R. 504a: see *infra*, this ch., sec. 3. Rule 504a applied only to proceedings in the Court of Appeal. The rule did not specify whether the "person interested" was a party intervenor or an *amicus curiae*. However, in *Re Schofield and the Minister of Consumer and Commercial Relations* (1980), 28 O.R. (2d) 764, at 770, 19 C.P.C. 245 (C.A.) (subsequent references are to 28 O.R. (2d)), Wilson J.A. stated that it was inappropriate for a lawyer who had failed to get status under R. 504a to then seek status as an *amicus curiae*. See, also, *Solosky v. The Queen*, [1978] 1 F.C. 609, at 613-14, 86 D.L.R. (3d) 316 (C.A.), where Heald J. left open the question "as whether a member of the bar has a status to apply to be appointed as *amicus curiae* in a case where the Court does not itself see the need for an *amicus curiae*". See *infra*, this ch., sec. 2(c), for a discussion of the *amicus curiae*.

[26] *Re Schofield*, *supra*, note 25; *Re Mannion (No. 2)* (1983), 44 O.R. (2d) 37, 4 D.L.R. (4th) 191 (C.A.); and *Wotherspoon v. Canadian Pacific Ltd.* (1981), 35 O.R. (2d) 449, 20 C.P.C. 72 (C.A.) (subsequent references are to 35 O.R. (2d)).

[27] *Supra*, note 25.

[28] *Ibid.*, at 770 and 774.

[29] *Ibid.*, at 773.

[30] *Supra*, note 26.

[31] *Re Schofield*, *supra*, note 25, at 771.

[32] *Ibid.*, at 775.

the adequacy of representation could put a court in the difficult position of assessing the competence of counsel in representing the interest of a proposed intervenor. The fact that a potential intervenor's interest or perspective could be broader or different than that of the original parties, and therefore might require separate representation, was not considered.

In the only other decision under Rule 504a, *Wotherspoon v. Canadian Pacific Ltd.*,[33] the Court of Appeal granted intervenor status to an applicant who sought to raise a number of novel issues, as well as to address certain issues raised by the existing parties. As with *Re Mannion (No. 2)*,[34] the particular facts of this case make it difficult to discern any general principles governing intervention under Rule 504a. However, what is interesting about *Wotherspoon* was the court's approach. Rather than refusing intervention on the ground of "broadening the lis", the court was willing to fashion the nature and extent of the proposed intervention in order to minimize the possible prejudice to the original parties. Moreover, the court avoided the notion of "adequacy of representation" with respect to those issues already raised by the original parties, by expressing confidence that the court could control possible duplication of argument "in the usual way".[35] In general, the court in *Wotherspoon* appeared disposed to enter into a thoughtful evaluation of the role, and potential contribution, of an intervenor, and to structure the nature and scope of intervention in a manner both appropriate and fair to all interested parties.

In summary then, to the extent that the interpretation of former Rule 504a may influence the evolution of Rule 13, *Re Schofield* at least indicates that a "direct interest" probably would not be required, and may indicate a more receptive attitude towards intervention generally.[36] Moreover, *Wotherspoon* illustrates a more flexible and creative approach to intervention that can serve to balance various interests arising in litigation.

### (ii) Rule 13.01(1): The Threshold Tests

We now turn to consider Rule 13 in greater detail. Rule 13.01 contemplates a two-stage process in a request for party intervention in a "proceeding".[37]

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[33] *Supra*, note 26.

[34] *Supra*, note 26.

[35] *Ibid.*, at 452.

[36] Muldoon and Scriven 1, *supra*, note 1, at 145.

[37] Rule 13.01(1). There is conflicting authority as to whether the rule permits interventions in motions. For cases refusing intervention in motions, see *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 115 (H.C.J.) (subsequent reference is to O.R. (2d)), and *Reichmann v. Toronto Life Publishing Co.*, (1988), 12 W.D.C.P. 298 (Ont. H.C.J.). For cases permitting intervention, see *Haal Securities Ltd. v. Goldhar* (1985), 6 C.P.C. (2d) 225 (S.C.O. Master); *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.* (1985), 47 C.P.C. 162 (Ont. C.A.); and *Somerleigh v. Marie*, unreported (January 23, 1986 and add'um

First, a "person"[38] who is not a party to a proceeding may move for leave to intervene as an added party on one of the following three grounds: (1) that he has "an interest in the subject matter of the proceeding"; (2) that he may be "adversely affected by a judgment in the proceeding"; or (3) that there exists between him and a party to the proceeding "a question of law or fact in common with one or more of the questions in issue in the proceeding".

Where one of these three threshold tests has been met, the court must then consider "whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding".[39]

### *a. "An Interest in the Subject Matter of the Proceeding"*

There is little case law interpreting "subject matter" in the context of rule 13.01(1)(a). In one case, the term was treated as synonymous with the "fundamental question for consideration" or the "central issue".[40] Pre-Rule 13 case law indicates that the phrase may encompass not only identifiable property, "but also various rights asserted or denied and the relief or enforcement of the rights sought".[41]

Perhaps a more important question is the nature of the "interest" that will satisfy rule 13.01(1)(a). As we have discussed, although earlier pre-Rule 13 cases used the "direct interest" test, more recent case law has witnessed movement towards a less restrictive requirement that the proposed intervenor show a "legitimate and substantial" interest in the subject matter. Moreover, the view of Thorson J.A. in *Re Schofield* indicates at least some disposition to interpret "interest" in a more flexible manner than had been the case previously. However, as indicated earlier, the case law under Rule 13 has not developed sufficiently to glean any general guidelines about what constitutes a sufficient "interest" or what approach the courts will adopt in the interpretation of that term.[42]

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February 3, 1986, Ont. H.C.J.). For a commentary on this issue, see Watson and McGowan, *Ontario Supreme and District Court Practice 1988* (1987), at xiv.

[38] Courts have yet to interpret this word in the context of R. 13. However, there is some indication that the Supreme Court of Canada may adopt a broad view of who may intervene: see *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406, aff'g (*sub nom. Re Association of Parents for Fairness in Education*) (1984), 54 N.B.R. (2d) 198, 8 D.L.R. (4th) 238 (C.A.).

[39] Rule 13.01(2).

[40] *Crown Trust Co. v. Rosenberg*, *supra*, note 37, at 118.

[41] Muldoon and Scriven 1, *supra*, note 1, at 147.

[42] The decision in *Crown Trust Co. v. Rosenberg*, *supra*, note 37, at 118, may indicate a restrictive approach. The court there held that the proposed intervenor had no interest in whether a receiver's acceptance of its bid for properties was in the best interests of the parties, observing that the intervenor's interest was "purely incidental and collateral to the central issue".

### *b. "Adversely Affected by a Judgment"*

Most of the decisions to date that consider whether the proposed intervenor "may be adversely affected by a judgment in the proceeding"[43] merely indicate that a person who may suffer a pecuniary or commercial loss may qualify under the second threshold test.[44]

### *c. Common "Question of Law or Fact"*

Again, there is little case law interpreting the third threshold test, which allows a non-party to move for leave to intervene in an existing proceeding if he and one or more of the existing parties have "a question of law or fact in common with one or more of the questions in issue in the proceeding".[45] However, the inclusion of this specific ground appears to have been a direct legislative response to the rejection by the Ontario Court of Appeal of "the common question of law or fact" basis for intervention in *Re Schofield*.[46]

It has been suggested that this test, unlike the first two, provides an entirely novel basis for intervention, that it is by far the broadest of the three, and that it gives the proposed intervenor a role very close to that of an *amicus curiae*.[47]

## (iii) Rule 13.01(2): The Exercise of Discretion

After determining that one of the three threshold tests has been met, the court may exercise its discretion to grant or deny leave to intervene. In so doing,

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[43] Rule 13.01(1)(b).

[44] *Halton Community Credit Union Ltd. v. ICL Computer Canada Ltd.*, *supra*, note 37; *Zentil Plumbing & Heating Co. v. Q-Sons Construction Co. Ltd.* (1986), 5 W.D.C.P. 15 (S.C.O. Master); *Vachliotis v. Exodus Link Corporation* (1987), 23 C.P.C. (2d) 72 (S.C.O. Master), at 73-75; and *Hansen v. Royal Insurance Co.*, *supra*, note 14. But see *Crown Trust Co. v. Rosenberg*, *supra*, note 37, and *General Dynamics Corp. v. Veliotis* (1987), 61 O.R. (2d) 111, at 117-18, 21 C.P.C. (2d) 159 (Div. Ct.).

This test has been said to be related to the first one: see *Friction Division Products Inc. v. E.I. DuPont de Nemours & Co. Inc.* (1985), 51 O.R. (2d) 244, 6 C.P.R. (3d) 66 (H.C.J.) (subsequent references are to 51 O.R. (2d)).

[45] Rule 13.01(1)(c). Rule 13.01(1)(c) was invoked in *Hansen v. Royal Insurance Co.*, *supra*, note 14; *Rubin v. Torlease Properties Ltd.*, unreported (March 5, 1985, S.C.O. Master), at 5; and *Vachliotis v. Exodus Link Corp.*, *supra*, note 44.

[46] *Supra*, note 25, at 772. This rejection was explained by Thorson J.A. as follows (*ibid.*):

> [T]he class of persons who might be argued to be 'interested' in an appeal involving a particular question of law would be potentially unlimited, since virtually everyone can be said to have an interest in how the laws of general application are interpreted and given meaning and effect by the Courts. This is particularly the case with new laws which give rise to litigation before the Courts the outcome of which predictably will affect many persons beyond those immediately involved as parties to the litigation.

[47] Muldoon and Scriven 1, *supra*, note 1, at 149-50.

rule 13.01(2) requires the court to consider the extent to which intervention would "unduly delay or prejudice the determination of the rights of the [existing] parties to the proceeding".[48] This then is the balancing provision; the advantage of permitting intervention is to be weighed against any delay or prejudice it would engender.[49] The operative word is "unduly".

However, it is as yet too early to determine with any certainty what will be considered "undue" delay or prejudice. In *General Dynamics Corp. v. Veliotis*,[50] the proposed intervenors sought to intervene in a proceeding a few days before the hearing of a motion for summary judgment. A majority of the court denied intervention on the ground that it would entail a year's delay for further pleadings, production of documents, and discoveries, which amounted to undue delay. In dissent, Rosenberg J. agreed with the majority that it would be improper to grant the very broad intervention that was being sought.[51] However, he would have granted intervention, including the right to file pleadings and adduce evidence, subject to time limits and restrictions on the issues in respect of which the applicant could intervene.[52]

### (iv) Power of the Court to Make "Such Order as is Just"

It appears that, unless otherwise limited by the court, party intervenors enjoy the same procedural rights as existing parties, including the right to file pleadings, participate in discoveries, adduce evidence, cross-examine witnesses, and make oral arguments.[53] They may also be able to challenge the

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[48] Note that in *Vachliotis v. Exodus Link Corporation*, *supra*, note 44, at 76, Master Garfield prefaced his finding that there was no undue delay or prejudice with the remark that "[c]ounsel concede that the test applicable to r. 5.03 [joinder] and r. 13.01 is the same".

In *Hansen v. Royal Insurance Co.*, *supra*, note 14, at 758, the court indicated that there might be other matters to be considered once a threshold test has been satisfied. The court did not, however, indicate what these other factors might be.

[49] But see *Rubin v. Torlease Properties Ltd.*, *supra*, note 45, at 3-4, where Master Clark held that, in the circumstances of the case, there would be undue delay and prejudice if intervention were refused.

[50] *Supra*, note 44.

[51] *Ibid.*, at 120. Rosenberg J. also stated that the majority, and the court below, had attached undue importance to the past delay of the proposed intervenor, and that r. 13.01(2) relates only "to future delay and not the delay from the time when the application could have been made": *ibid.*

[52] See, also, *Zentil Plumbing & Heating v. Q-Sons Construction Co.*, *supra*, note 44. In that case, the Court had been concerned that the plaintiff would inevitably be prejudiced if it were unable to make the same demands for disclosure upon the intervening party as it could make upon the original defendant in the action.

[53] Muldoon and Scriven 1, *supra*, note 1, at 132. In *Halton Community Ltd. v. ICL Computers Canada Ltd.* (1985), 3 C.P.C. (2d) 252 (C.A.) (hereinafter referred to as "Halton II"), Arnup J.A. refused a motion by an intervenor to cross-examine on an affidavit used on a hearing below, stating, at 253, that the intervenor "takes the record as it exists, subject to his right to seek leave to adduce new evidence on the appeal". Carwana, in an annotation to this case, (*ibid.*, at 252) has commented on the problem that this ruling poses for proposed intervenors:

plaintiff's standing to initiate the proceeding.[54] Furthermore, party intervenors may be allowed to continue a proceeding when one of the existing parties withdraws, or to seek leave to appeal when an original party does not do so.[55]

However, as we have indicated, the scope of an intervention may be circumscribed by the court, which is empowered by rule 13.01(2) to "make such order as is just".[56] The case law suggests that the making of an "order as is just" is related to the court's consideration of the delay or prejudice that an intervention would cause to the existing parties.[57] Nevertheless, there may be no necessary connection between undue delay or prejudice, on the one hand, and the making of an "order as is just", on the other. For example, the case of *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.* indicates that factors such as tardiness in seeking leave and the apparent lack of merit of the intervenor's claim may also influence the court.[58] However, it remains to be seen whether the courts will reintroduce the notions of "adequacy of representation" or "broadening the lis" as factors either in determining the question of undue delay and prejudice or in making an "order as is just".

### (c) Intervention as a "Friend of the Court"

Until now, Rule 13 has been discussed in the context of intervention as an added party. Rule 13 also provides for an alternative form of intervention as "a friend of the court":

> 13.02—Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

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> The lesson to be learned from this case is that a party seeking intervenor status should apply as soon as possible in the proceedings. The difficulty counsel may face on an early application is that the Court may question whether the party has a sufficient interest in the proceedings to warrant intervenor status.

[54] See, for example, *Re Energy Probe and Attorney General of Canada* (1987), 61 O.R. (2d) 65 (H.C.J.), where the intervenor, Ontario Hydro, supported by the defendant Attorney General of Canada, successfully challenged the plaintiff's standing.

[55] Muldoon and Scriven 1, *supra*, note 1, at 132. See, for example, *Zentil Plumbing & Heating v. Q-Sons Construction Co.*, *supra*, note 44; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, *supra*, note 38; *Re Ontario Energy Board* (1985), 51 O.R. (2d) 333, 19 D.L.R. (4th) 753 (Div. Ct.), leave to appeal denied (1985), 15 Admin. L.R. 114 (Ont. C.A.); and *Bank of Montreal v. Hatheway Realty Ltd.* (1983), 47 N.B.R. (2d) 81, 124 A.P.R. 81 (C.A.).

[56] Until amended in 1986 by O. Reg. 221/86, s. 1, the phrase read "make such order as to pleadings and discovery as is just".

[57] Rule 504a was given a similar treatment: see *Wotherspoon v. Canadian Pacific Ltd.*, *supra*, note 26. See, also, *Zentil Plumbing & Heating v. Q-Sons Construction Co.*, *supra*, note 44, and *General Dynamics Corp. v. Veliotis*, *supra*, note 44.

[58] *Supra*, note 37, at 164.

Rule 13.02 has its origins in the concept of *amicus curiae*.[59] Traditionally, in England and Ontario, the *amicus* was a non-partisan or neutral person who informed the court of precedents or statutes that had not been cited by counsel, or circumstances of which the court was unaware, or who acted as guardian of the unrepresented.[60] However, even before the advent of Rule 13 in Ontario, there was some indication that a person with an adversarial position might be granted *amicus* status.[61]

Like rule 13.01 intervention, the nature and extent of the participation as a friend of the court under rule 13.02 is discretionary. In this regard, it has been suggested that the reference in rule 13.02 to "argument" will encourage the development of a trend towards a broader advocacy role for an *amicus*.[62] In any event, the language of rule 13.02 would appear to encompass both oral and written argument. However, since rule 13.02 provides for intervention without becoming a party, it appears that a friend of the court cannot file pleadings, introduce a new cause of action, assume management of the action, or be bound by the judgment.[63] It is likely that a friend of the court would not be entitled to appeal or question the validity or constitutionality of a statute. However, it has been suggested that a court might in rare situations allow him to adduce evidence.[64]

Recent case law indicates that requests for leave to intervene under rule 13.02 have usually been made by public interest groups seeking to make submissions on a matter of public policy, and that courts have generally granted intervention in such circumstances.[65] While rule 13.02 does not indicate how a court is to exercise its discretion, it appears that some of the factors that may be influential include: the extent to which the expertise of the proposed intervenor

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59 Muldoon and Scriven 1, note 1, at 450-53. See, also, Levy "The *Amicus Curiae* (An Offer of Assistance to the Court)" (1972), 20 Chitty's L.J. 94, and 135, and Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy" (1963), 72 Yale L.J. 694, at 694-97.

60 *Re Clark*, *supra*, note 22, at 596-98. For other Ontario cases, see Muldoon and Scriven 1, *supra*, note 1, at 449, *n.* 3.

61 See, for example, *McDonald's Restaurant of Canada Ltd. v. Corporation of the Borough of Etobicoke*, *supra*, note 18, at 57. See, also, *Re Schofield*, *supra*, note 25, at 771, a case decided under R. 504a, where the court noted the following:

> This is not an application on behalf of a private or public interest group which might bring a different perspective to the issue before the Court. It is an application on behalf of an individual private litigant said to be identical in interest to the appellant.

See, also, *ibid.*, at 773 and 776. See, generally, Scriven and Muldoon 2, *supra*, note 1, at 452-57, and Krislov, *supra*, note 59, at 702-20.

62 Scriven and Muldoon 2, *supra*, note 1, at 456-57 and 472.

63 *Ibid.*, at 455.

64 *Ibid.* However, the practice to date appears to have allowed only oral or written argument.

65 *Canadian Newspapers Co. Ltd. v. Attorney-General of Canada* (1986), 55 O.R. (2d) 737 (H.C.J.); *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, 2 C.P.C. (2d) 117, additional reasons at (1985), 51 O.R. (2d) 43, 2 C.P.C. (2d) 144 (Div. Ct.), leave to appeal refused (1985), 17 O.M.B.R. 511 (Ont. C.A.); and *Re Ontario Energy Board Act*, *supra*, note 55.

can assist the court, particularly with respect to policy matters; the applicant's involvement and interest (not necessarily in a traditional sense) in the *lis*; and the potential impact of the litigation on persons other than the existing parties.[66]

## 3. INTERVENTION APART FROM RULE 13

Rule 13 does not exhaust the means by which intervention may be obtained; a number of common law and statutory rights also exist. First, it is arguable that, in Ontario, the court's inherent jurisdiction to control its own procedure continues to encompass the power to permit intervention.[67] It has been suggested that the court may exercise its inherent jurisdiction "even in respect of matters which are regulated by statute or by rules of court, so long as it can do so without contravening any statutory provision".[68]

Second, numerous statutes, rules and regulations permit intervention by third parties as of right, or by leave, in specific circumstances.[69]

Finally, in addition to the right of the Attorney General in Ontario to seek intervenor status under Rule 13, he has certain common law and statutory rights of intervention. The common law right of the Attorney General to intervene appears to be derived from the English position, which has been summarized as follows:[70]

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[66] See, generally, *ibid.*, and Scriven and Muldoon 2, *supra*, note 1, at 467.

[67] Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Probs. 23, at 23-25, and Watson and McGowan, *supra*, note 10, at xii. But see Australian Report, *supra*, note 1, para. 279, at 151, where it is stated that the court has no inherent power to permit intervention, because the adversarial system assumes the primacy of the parties' power to control their litigation. In Ontario, the inherent jurisdiction of the court is preserved by the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 2(1). See, also, *City of Toronto v. Toronto R.W. Co.* (1918), 44 O.L.R. 308 (App. Div.), at 316, aff'd [1920] A.C. 455 (P.C.), where it is stated that the jurisdiction of a superior court cannot be ousted except by express language in, or by obvious inference from, a statute.

[68] Jacob, *supra*, note 67, at 24. The view of Master Jacob has been quoted with approval by the British Columbia Court of Appeal in *Re Canadian Labour Congress and Bhindi* (1985), 61 B.C.L.R. 85, 17 D.L.R. (4th) 193 (subsequent reference is to 17 D.L.R. (4th)). However, it should be noted that there is no separate intervention rule in British Columbia. See, also, *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, *supra*, note 38.

[69] For example, any "person interested" may intervene in a probate, administration or guardianship application in the Surrogate Court: Rules of Practice-Surrogate Court, R.R.O. 1980, Reg. 925, r. 38(1). A court must notify an individual of a petition to quiet title to land, if it appears that he has "a claim adverse to or inconsistent with that of the petitioner": *Quieting Titles Act*, R.S.O. 1980, c. 427, s. 13. See, also, *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 22; *Creditors' Relief Act*, R.S.O. 1980, c. 103, s. 12(3); and *Courts of Justice Act, 1984*, *supra*, note 67, s. 49.

[70] *Adams v. Adams*, [1971] P. 188, [1970] 3 All E.R. 572, at 576-77. See, also, *Attorney-General v. Barker* (1872), L.R. 7 Exch. 177, 41 L.J. Ex. 57; *Attorney-General v. Constable* (1879), 4 Ex. D. 172, at 173-74, 48 L.J. Ex. 455; *Dixon v. Farrer* (1886), 18 Q.B.D. 43, 56 L.J.Q.B. 53 (C.A.); and *Lord Stanley of Alderley v. Wild & Son*, [1900] 1 Q.B. 256 (C.A.). For Canadian cases, see *Attorney-General for British Columbia v. The Esquimalt and Nanaimo Railway Co.* (1900), 7 B.C.R. 221 (B.C.S.C. on app.), at 227-28, and *R. v. Starkey* (1891), 7 Man. R. 489 (Q.B. on app.), at 491. See, generally, 8 C.E.D. (Ont. 3rd), Title 40, §369; Robertson, *The Law*

> [T]he Attorney-General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including its relations with foreign States. . . ; and he certainly has in such circumstances a locus standi at the invitation of the court . . . or with the leave of the court. . . .
>
> I think that the Attorney-General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court.

In Ontario, the Attorney General also enjoys a number of statutory rights of intervention.[71] For example, section 122 of the *Courts of Justice Act, 1984*[72] gives the Attorney General the right to appear and participate in proceedings where an issue of constitutional law is raised.[73] And section 9(4) of the *Judicial Review Procedure Act*[74] gives the Attorney General of Ontario the right to intervene in applications for judicial review of administrative behaviour.[75]

## 4. OTHER JURISDICTIONS

### (a) Canada

#### (i) Supreme Court of Canada

Rule 18(1) of the Rules of the Supreme Court of Canada[76] provides that "any person interested in an appeal or a reference" may intervene with leave of a

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*and Practice of Civil Proceedings by and against the Crown and Departments of the Government* (1908), at 583-85 and 587-89; Edwards, *supra*, note 1, at 153-58; and Williams, *Crown Proceedings* (1948), at 124 and 144-45.

In *Re Energy Probe and Atomic Energy Control Board* (1984), 8 D.L.R. (4th) 716, 43 C.P.C. 13 (F.C., T.D.), aff'd (1984), 15 D.L.R. (4th) 48, 56 N.R. 135 (F.C.A.), leave to appeal to Supreme Court of Canada refused (1984) 15 D.L.R. (4th) 48*n*, the Attorney General of Canada was granted party intervenor status by the Federal Court of Appeal on the ground that the issue before the court was "one of general public importance and of such a nature that the court deemed it beneficial to hear argument of the Attorney-General in order to ensure that all arguments were adequately canvassed".

71 In addition, the Ontario Attorney General has rights of intervention in the Supreme Court of Canada and the Federal Court. See discussion *infra*, this ch., secs. 4(a)(i) and (ii).

72 *Supra*, note 67.

73 See, generally, Welch, *supra*, note 1, at 223-27. For statistics regarding intervention pursuant to s. 122, see Ministry of the Attorney General, *Annual Report, 1984-85* (1985), at 52, and Ministry of the Attorney General, *Annual Report, 1987* (1987), at 44 and 51.

74 R.S.O. 1980, c. 224.

75 For statistics regarding intervention pursuant to s. 9(4), see Ministry of the Attorney General, *Annual Report, 1982-83* (1983), at 49, and Ministry of the Attorney General, *Annual Report 1985-86* (1986), at 45.

76 Rules of the Supreme Court of Canada, S.O.R./83-74, as am. by S.O.R./87-292. For a discussion of the changes to the rule, see Welch, *supra*, note 1, at 215-20, and Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review* (3d ed., 1988), at 172-73.

judge. Interventions upon appeal[77] under the predecessor of Rule 18(1)[78] were rarely allowed until the mid-1970's, when, in a number of cases, the court adopted a more favourable attitude towards participation by interested groups.[79] However, it appears that, more recently, the court has once again become less sympathetic to interest group interventions.[80] Since the court has not offered written reasons where intervenor status has been refused, this movement away from more liberal intervention remains unexplained.[81]

On the other hand, the court may be more receptive to interventions upon a reference.[82] The court has permitted many kinds of individuals and groups, representing a wide range of interests, to intervene in references before it.[83]

Besides these permissive interventions, the Rules of the Supreme Court permit Attorneys General to intervene as of right in the Supreme Court of Canada in both appeals and references to the court.[84] With respect to references, the *Supreme Court Act*[85] gives provincial Attorneys General the right to intervene in a reference relating to the "constitutional validity" of provincial legislation or where a provincial government has a "special interest" in the reference.[86]

### (ii) Federal Court of Canada

The Federal Court Rules do not specifically provide for intervention, apart from intervention by Attorneys General.[87] Rather, the joinder rule has been the procedural vehicle for intervention.[88]

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77 It should be noted that the court limits leave to appeal to civil cases in which a question of public importance is in issue: see Bushnell, "Leave to Appeal Applications to the Supreme Court of Canada: A Matter of Public Importance" (1982), 3 Supreme Ct. L. Rev. 479.

78 Rules of the Supreme Court of Canada, S.O.R./83-74, r. 60.

79 The cases in question are *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349, 38 D.L.R. (3d) 481, and *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161. See, also, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, and *R. v. Miller and Cockriell*, [1977] 2 S.C.R. 680, 70 D.L.R (3d) 324. For an excellent discussion of intervention in the Supreme Court of Canada, see Welch, *supra*, note 1. See, also, Dickens, "A Canadian Development: Non-Party Intervention" (1977), 40 Mod. L. Rev. 666, at 674, and Swan, *supra*, note 3.

80 Welch, *supra*, note 1, at 221-22.

81 Swan, *supra*, note 3, at 28, and Welch, *supra*, note 1, at 221-22.

82 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53(6).

83 Strayer, *supra*, note 76, at 171-73, and Welch, *supra*, note 1, at 227.

84 Rule 32(1) of Rules of the Supreme Court of Canada, S.O.R./83-74, as am. by S.O.R./84-821.

85 *Supra*, note 82.

86 *Ibid.*, s. 53(5).

87 Rule 1101 of the Federal Court Rules, C.R.C. 1978, c. 663.

88 *Ibid.*, r. 1716(2)(b).

While the Federal Court took a restrictive view of interventions in the 1970's,[89] in recent years the court has been more receptive to interventions. For one thing, it appears that the court has been willing to adopt a more liberal "interest" test.[90] Moreover, the Federal Court's attitude may have been influenced by Rule 5 of the Federal Court Rules, which allows it to adopt the rules and procedures of the province to which the subject matter of the proceedings particularly relates. For example, after Rule 13 was implemented in Ontario, the Federal Court seemed to be more willing to allow intervention.[91]

### (iii) Intervention in Other Common Law Provinces

Each of the Canadian common law provinces provide for some form of intervention in civil proceedings, either pursuant to a specific intervention rule[92] or through the use of a rule respecting joinder of parties.[93] However, only New Brunswick[94] and Saskatchewan[95] have intervention rules sufficiently analogous to Rule 13 to warrant specific mention here.

Unfortunately, while rule 15.01 of the Rules of Court of New Brunswick was the model for, and is virtually identical to, Rule 13, little case law has developed to assist in the interpretation of the rule.[96]

Rules 39 and 75 of the Saskatchewan Queen's Bench Rules are also similar to Rule 13, although there are several substantive differences. Party interven-

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89 In *The Queen v. Bolton*, [1976] 1 F.C. 252, at 252-53, 66 D.L.R. (3d) 414 (C.A.), Jackett C.J. held that it was inappropriate to grant leave to someone "merely because he has an interest in another controversy where the same question of law will or may arise as that which will or may arise in the controversy that is before the Court". See, also, *Solosky v. The Queen*, *supra*, note 25.

90 *Fishing Vessel Owners' Association of British Columbia v. Attorney General of Canada* (1985), 57 N.R. 376, 1 C.P.C. (2d) 312 (F.C.A.) (subsequent reference is to 1 C.P.C. (2d)).

91 *Airport Taxicab (Malton) Association v. Minister of Transport*, unreported (November 3, 1986, F.C., T.D.). For a another discussion of the relation between R. 5 and provincial intervention regimes, see *Fishing Vessel Owners' Association of British Columbia v. Attorney General of Canada*, *supra*, note 90, at 318-19.

92 See Alberta, The Supreme Court Rules, r. 38(b); Nova Scotia, Civil Procedure Rules, r. 8; Prince Edward Island, Civil Procedure Rules, r. 8, and Newfoundland, Rules of the Supreme Court, rr. 7.05 and 7.06.

93 See Manitoba Queen's Bench Rules, r. 51(2), and British Columbia, Rules of Court, r. 15(5)(a)(ii) and (iii). The British Columbia Law Reform Commission canvassed the jurisprudence on *amicus* intervention in its *Report on Civil Litigation in the Public Interest*, LRC 46 (1980), at 54-55. It made no recommendation for change with respect to intervention, apart from proposing that the Attorney General should be allowed to intervene in a "public interest proceeding": *ibid.*, at 74-75.

94 Rules of Court of New Brunswick, r. 15.01.

95 Rules of Court of the Province of Saskatchewan, rr. 39 and 75.

96 *O'Donnel v. Zed* (1983), 48 N.B.R. (2d) 134, 126 A.P.R. 134 (N.B.Q.B.) is the only reported decision on r. 15.01. The Law Society of New Brunswick was granted intervenor status as insurer for a lawyer defending a negligence action.

tions under Rule 39 are limited to actions, although *amicus* interventions under Rule 75 can occur in a proceeding. Furthermore, Rule 39 does not indicate what factors the court should consider in granting leave once one of the threshold tests has been satisfied. From the very limited case law under the Saskatchewan rules, it appears that the courts have adopted a fairly restrictive approach to party intervention.[97]

### (b) Australia

#### (i) The Present Law

In Australia, a non-party can participate in existing civil proceedings either as a party intervenor,[98] or as an *amicus curiae*.[99] It appears that all intervention is pursuant to statutory provisions and that the court has no inherent power to permit a third party to intervene.[100]

The position of party intervenors appears to be essentially the same as that in Ontario.[101] The Attorney General has a common law right to intervene where Crown prerogatives are affected, and a statutory right to intervene in constitutional cases, judicial reviews, certain Family Court proceedings, and in specified proceedings before the Industrial Division of the Federal Court.[102]

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97 In *Kalinocha v. Kalinocha* (1985), 38 Sask. R. 50, [1985] 3 W.W.R. 137 (Sask. U.F.C.), the court held that creditors seeking to challenge the transfer of certain farm property from a husband to a wife in a matrimonial action held that they had an interest in the outcome of the action, but that they had no legal or equitable interest in the subject matter of the action, namely, the division of matrimonial property. In reaching this decision, however, the court declined to follow other cases, including *Bray v. Bray* (1979), 9 C.P.C. 241 (Ont. H.C.J.), where, on similar facts, an execution creditor was allowed to intervene under R. 136 of Ontario's former Rules of Practice, *supra*, note 9.

98 What we refer to as party intervenors are referred to in Australia simply as "interveners".

99 Australian Report, *supra*, note 1, para. 273, at 151.

100 *Ibid.*, para. 279, at 151.

101 In the Australian Report, *supra*, note 1, para. 274, at 148-49, the Australian Law Reform Commission described the position of party intervenors as follows:

> Persons who are permitted by the court to participate fully as interveners become parties to the proceedings, entitled to all the privileges of a plaintiff or a defendant. They may file pleadings, lead evidence, cross-examine witnesses, present arguments and appeal against decisions. Orders for costs may be made against them or in their favour. Intervention may be granted as of right or by leave of court. It may be total, or it may be limited to certain issues specified by statute or laid down by the court when granting leave to intervene. Leave to intervene is not to be interpreted as a general licence to discuss every interesting question in the case, but is limited to the submission of an argument on behalf of the particular interest.

102 Australian Report, *supra*, note 1, paras. 276-78, at 149-51. There is conflicting authority as to whether the Attorney General enjoys a general right to intervene where a question of public policy is in issue in an existing proceeding: *ibid.*, para. 277, at 149-50.

In Australia, the traditional view of the *amicus* as a non-partisan survives,[103] but a broader view of his functions has also been adopted. In some public interest cases, an *amicus* has been permitted "to appear solely on the basis that a concerned individual or interest group has wished to assert views on the case before the court".[104] The Australian Law Reform Commission observed that this role goes beyond merely acting as a "friend of the court", by "ensuring that a party, or some person vitally involved in the case . . . does not suffer because his or her interests are not upheld in the arguments put to the court". It then added:[105]

> This broadening of the role of *amicus* reflects the considerations that in public interest litigation there are often a wide range of public interest perspectives to be considered and that the court may think it desirable to let all concerned parties have their 'day in court' even if they merely advance arguments already ventilated.

### (ii) Australian Reform Proposals

The Australian Law Reform Commission and the Law Reform Committee of South Australia have both published reports dealing with intervention.

#### *a. Australian Law Reform Commission*

In its 1985 report on *Standing in Public Interest Litigation*, the Australian Law Reform Commission stated its general position on intervention as follows:[106]

> In general terms, participation by persons other than the original parties to public interest litigation is to be encouraged, though the court must maintain control over such participation when it is sought by persons other than the Attorney-General. The proposed widening of standing rights increases the possibility that the plaintiff in a public interest case will not necessarily be the person whose interests are most directly served by the bringing of the litigation. The techniques of intervention and *amicus curiae* should therefore be developed and streamlined so far as is necessary to ensure all persons who are not mere busybodies have the right and the opportunity to seek leave from the court to present their views.

##### *(1) Party Intervention*

The Commission outlined the advantages and disadvantages of party intervention, and recognized the need "to balance outside interests, and the general desirability of enforcing the rule of law, on the one hand, with the rights of the original plaintiff, on the other".[107] While acknowledging that intervention

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[103] *Ibid.*, para. 287, at 155. See, also, South Australia Report, *supra*, note 1, at 8-9.

[104] Australian Report, *supra*, note 1, para. 288, at 155.

[105] *Ibid.*

[106] *Ibid.*, para. 297, at 159.

[107] *Ibid.*, para. 301, at 160.

involves loss of party control, the Commission was of the view that, "particularly when broad standing rights apply, the interests of numerous sections of the community in public interest litigation will not be served if rights of intervention are wholly cut off".[108]

The Commission outlined a number of considerations that should guide a court in determining whether party intervention should be granted, including:[109]

— whether the person seeking to intervene has a proprietary, material, financial or special interest in the subject-matter of the litigation;

— in a case concerning the enforcement of private rights vested in persons other than the would-be intervener, the wishes or interests of such persons regarding intervention (so far as they can be ascertained); and

— whether the would-be intervener is capable of fulfilling the role of an intervener adequately.

The Commission also recommended that the Attorney General should be given a right to intervene in public interest litigation "in order to protect Crown prerogatives or to argue issues of general public policy",[110] and that courts should be empowered to notify non-parties "who conceivably may be interested in intervening", including Attorneys General, of existing litigation.[111]

### *(2) Amicus Curiae*

With respect to the *amicus curiae,* the Commission observed that the *amicus* role may be more appropriate than party intervention where outsiders have neither a legal right that they wish to protect nor a close interest in the subject matter.[112]

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[108] The Commission also observed (*ibid.*):

> [I]ntervention should be allowed to avert the possibility that in a public interest case brought by one plaintiff under the enlarged standing test, a result may ensue which is unsatisfactory to another potential plaintiff, perhaps one with opposed interests. If this person can be allowed to intervene in the first action, so as to become a party to it, he or she is bound by that and cannot relitigate the point, by virtue of the doctrine of *res judicata*. If no intervention is allowed subsequent litigation is still a possibility.

[109] See *ibid.*, para. 302, at 160-61, where the Commission cautioned:

> It should be made clear, however, that the lack of a proprietary, material, financial or special interest in the subject-matter of the litigation should not be enough of itself to warrant a refusal of leave to intervene. It should also be made clear that a person who obtains leave to intervene under the provisions being recommended should become a party to the proceedings. Participation without being deemed a party should be permitted under the principles relating to *amici curiae*.

[110] *Ibid.*, para. 300, at 160.

[111] *Ibid.*, para. 303, at 161.

[112] *Ibid.*, para. 299, at 159.

Moreover, the Commission noted that the *amicus* role can be less expensive than participation as party intervenor. The Commission recognized, however, that each procedure has advantages and disadvantages, and recommended that both types of intervention should be available for use in appropriate circumstances, subject to the discretion of the court.

The Commission also recommended that statutory recognition should be given to the court's discretion to permit oral and written submissions by an *amicus*,[113] and that the use of written *amicus* briefs should be encouraged because they are less expensive for the existing parties and the *amicus*, and more convenient for the courts.[114]

### *b. Law Reform Committee of South Australia*

In 1982, the Law Reform Committee of South Australia examined what it called non-party intervention, which included *amicus curiae*, in the context of other forms of intervention.[115] The Committee was of the view that participation by a third person should be a matter of right "where [that] person claims to be so affected by a potential decision that he should be able to participate in that decision".[116] It recommended that such participation should be to the extent necessary to protect his interest in the dispute, which may entitle him to formulate the very issues to be litigated. A third person would be bound by the decision in any case in which he participated.

On the other hand, where intervention is sought merely on the ground that the intervenor can assist the court in reaching an informed decision, the Committee was of the view that the proposed intervention must be justified by reference to the contribution it would make. It is intervention of this kind that was considered by the Committee to be "non-party" intervention, for which the following test was recommended:[117]

> Non-party intervention may be allowed where the intervener can provide arguments or facts which will contribute to the court's reaching an informed decision, and where the significance of these arguments or facts is sufficient to outweigh any expense and/or delay which may be caused to the parties by such intervention.

The Committee further recommended that the factors to be considered for non-party intervention should include the intervenor's interest in the proceedings;[118] the nature of the dispute between the parties; the ability of the existing

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113 *Ibid.*, para. 304, at 161.

114 *Ibid.*

115 South Australia Report, *supra*, note 1, at 5.

116 *Ibid.*

117 *Ibid.*, at 6.

118 Not as a test for intervention, but as an indication of the extent to which the intervenor can contribute: *ibid.*

parties to present the arguments and/or information that the intervenor intends to adduce; and the nature of the contribution that the intervenor is able to make.[119]

With respect to *amicus curiae*, the Commission recommended that the Supreme Court should be given the power to appoint counsel, either to address the court orally, or to file a written brief, in the following circumstances:[120]

> when (a) a novel question of interpretation arises and no party appears to put an opposing argument, (b) conflicting precedents exist which cannot be resolved without some additional point of view being argued which is not in the interest of those who are already parties to the action to argue, or (c) a question of procedure or of the jurisdiction of the Court [or] of the legality of the proceedings is raised by the issues but no party wishes to take such a point.

## 5. CONCLUSIONS AND RECOMMENDATIONS

### (a) General

As we indicated at the outset of this chapter, our goal in addressing intervention in this report has been to ensure that, as far as possible, the principles and policies underlying intervention in civil proceedings in Ontario are roughly analogous to those governing the liberalized standing regime that we have recommended. Indeed, because broadened access to the courts will increase the possibility that a plaintiff may not be the person most directly or significantly affected by the litigation, participation by persons other than the original parties to a proceeding will be of increased importance under our proposed standing rules. What is needed is a flexible intervention procedure that is capable of facilitating access to the courts by an expanded range of persons and interests, while carefully balancing concerns about potential prejudice and fairness to the various parties to a proceeding.

As we have discussed, the current intervention regime in Ontario, pursuant to Rule 13, is at a very rudimentary stage of development. It remains, therefore, largely speculative whether its operation will ensure the achievement of the goals we have articulated. However, we believe that Rule 13 is capable of the kind of broad and innovative interpretation that will allow it to evolve over time in a manner consistent with these principles and policies, particularly with respect to litigation involving public policy matters and non-traditional legal interests.

We hope and expect that the courts in Ontario will recognize the clear advantages that can flow from intervention, rather than remaining bound by traditional concerns about party control of proceedings, or possible unmanageability of litigation. As outlined in the introduction to this chapter, intervention

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[119] *Ibid.*, at 6-7.

[120] *Ibid.*, at 8-9.

can promote better informed and more acceptable decision-making, particularly in cases where broader, more diffuse interests may be implicated.[121] Pluralistic participation in cases involving matters of wide public importance can assist the courts in a variety of ways, and we feel confident that the courts of Ontario will welcome such assistance.[122]

We recognize that legitimate concerns will continue to arise with respect to fairness to original parties who could suffer prejudice from the increased cost or delay caused by intervention. However, rather than denying intervention altogether on grounds such as "broadening the lis", or "adequacy of representation", we hope that the courts will utilize the flexibility of Rule 13 to fashion intervention creatively in a manner that is appropriate and fair to all parties concerned. Intervention could be limited to specified issues, or the nature of the participation could be circumscribed at the outset, so that limitations may be placed on costly or time-consuming procedures such as discovery or cross-examination.[123]

However, in our view, the most important and welcome development with respect to the evolution of Rule 13 will be an approach to intervention by the courts that involves a thoughtful assessment of the various interests affected by a proceeding, and a careful evaluation of the contribution that proposed intervenors can make to the resolution of the issues raised therein.

There are already indications that, in Ontario, the prevailing attitude of the courts and parties alike reflects an increasing acceptance of the role of intervenors in proceedings raising matters of broad public concern. In one of the first decisions with respect to Rule 13, the Divisional Court indicated the rationale for its willingness to allow broader intervention, at least as a "friend of the court", in "public interest" cases:[124]

> In this application, the matter was, strictly speaking, a dispute which directly concerned the applicants, the two respondents and none other. There was a *lis* between these parties for the court to determine. It was almost inevitable, however, that the decision of this court would be made on grounds that would have a profound effect on many parties, including public utilities and public interest groups of one sort or another having frequent occasion to appear before a joint board, or, because of the similarity of the legislation, the Energy Board. In these circumstances, we had

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121 For a discussion of the advantages of intervention in public interest litigation, see Bryden, *supra*, note 1, at 505-13.

122 The British Columbia Court of Appeal has welcomed the assistance that intervention offers in *Charter* cases: see *Canadian Labour Congress v. Bhindi*, *supra*, note 68, at 204.

123 See, for example, *Wotherspoon v. Canadian Pacific Ltd.*, *supra*, note 26, where the court carefully defined the terms upon which intervention would be granted. See, also, *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*, *supra*, note 38.

124 *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.*, *supra*, note 65, at 44. See, also, *Re Ontario Energy Board*, *supra*, note 55.

little difficulty in determining that any of the four proposed intervenors might well be of assistance to the court by way of argument, and accordingly leave was granted to all four to intervene as friends of the court.

Moreover, it appears that, at least with respect to references, the Ontario Court of Appeal is generally willing to allow intervention by most persons who wish to express a view, although such intervention may be limited to written submissions. There also appears to be an increasing willingness on the part of original parties to proceedings involving public law issues—for example, where Charter and environmental questions are raised—to consent to intervention by public interest groups.[125]

The Commission is confident that this apparent trend towards an innovative and flexible use of Rule 13 intervention will be influenced and strengthened by the introduction of our proposed standing regime, which will provide an express and clearly articulated policy of liberalized access to the courts. For these reasons, we recommend that the Rule 13 intervention regime should not be altered, but that Rule 13 should be given an opportunity to evolve over time on a case-by-case basis. However, in the event that Rule 13 should not develop in this direction, we recommend that it should be reconsidered with a view to reform.

### (b) The Role of the Attorney General

We want to emphasize that, despite our earlier rejection of the Attorney General's role as "gatekeeper" of proceedings in the "public interest",[126] we nevertheless expect that the Attorney General will continue to be an important voice regarding matters of public concern. We have recommended that there should be no change in the law with respect to the Attorney General's own standing to commence civil proceedings, which is largely unfettered with respect to public policy issues.[127] We further recommend here that nothing in our proposals should limit or affect in any way the right of the Attorney General to intervene in a civil proceeding initiated by another person, to the extent permissible by law.

The Attorney General would, therefore, continue to enjoy various statutory and common law rights of intervention,[128] including the same right as any other person to move under Rule 13 to intervene in a proceeding.[129] We are confident

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[125] For example, in the case of *Re Energy Probe and Attorney-General of Canada*, *supra*, note 54, the plaintiff Energy Probe consented to the intervention of Ontario Hydro. Interestingly, immediately after being added as a party, Ontario Hydro initiated a successful motion challenging the standing of Energy Probe.

[126] *Supra*, ch. 4, sec. 3.

[127] *Ibid.*

[128] *Supra*, this ch., sec. 3.

[129] *Supra*, this ch., sec. 7.

that, in those cases where the Attorney General is well placed to bring attention to an alternative, or perhaps a broader, view of a matter of public concern, the court will undoubtedly welcome his intervention.

For example, under current law, the Attorney General is the only person entitled to bring civil proceedings to enjoin criminal conduct.[130] Under our proposed standing regime, the Attorney General's exclusive control over such proceedings would be abolished, and any person would be entitled, by means of a civil proceeding, to seek to enjoin conduct that is subject to legislative sanctions, whether criminal, quasi-criminal, or regulatory. While, on principle, we support this liberalized access to the courts, we recognize that, in some cases, such proceedings could interfere with the legitimate exercise of the Attorney General's prosecutorial discretion, which often involves the balancing of complex considerations of public policy.[131] However, we are satisfied that in such a case, the Attorney General could apply to the court for party intervenor status in order to raise these concerns, either at the trial on the merits, or on a standing motion brought by the Attorney General after intervention.[132] In our view, this represents a fair balance between the abolition of the Attorney General's current exclusive control over proceedings to enjoin criminal conduct and concerns about the legitimate exercise of the Attorney General's prosecutorial discretion.

A related matter concerns whether the fact of participation by the Attorney General in a proceeding, as either an original party or an intervenor, should influence a court's decision to grant intervention to another person. As we have clearly indicated, while we agree that the Attorney General should continue to enjoy his current rights of standing and intervention, we believe that the Attorney General's view of what constitutes the "public interest" should not be dispositive. Accordingly, we recommend that no person should be denied intervenor status solely because the Attorney General is already a party to the proceedings.[133]

### (c) Notice to Relevant Ministers

Not only the Attorney General, but other Ministers of the Crown, may have an interest in the possible outcome of a proceeding, particularly where it could

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130 As a matter of practice, such an injunction will be granted only in very limited circumstances, generally where there has been a repeated flouting of the law due to an insufficient penalty: *Attorney-General for Ontario v. Grabarchuk* (1976), 11 O.R. (2d) 607, 67 D.L.R. (3d) 31 (Div. Ct.).

131 An example of such a case is *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.), where the Attorney General had refused his fiat for a proceeding to enjoin the defendant union from boycotting the delivery of mail to South Africa. Later in Parliament, the Attorney General justified his refusal on the ground that, in his judgment, such proceedings could have further inflamed an already volatile labour relations climate. See Edwards, *The Attorney General, Politics and the Public Interest*, *supra*, note 1, at 129-37.

132 As to the right of a party intervenor to challenge a plaintiff's standing, see discussion *supra*, text accompanying note 54.

133 See the Commission's proposed *Access to Courts Act* (hereinafter referred to as "Draft Act"), s. 2(4). The Draft Act appears as Appendix 1 of this report.

affect existing regulatory schemes arrived at through negotiations with those in breach of regulatory or other similar provisions. For example, it is possible that a proceeding to enjoin the dumping of effluent in a stream could prejudice the operation of a regulatory scheme agreed upon by an alleged polluter and the Ministry of the Environment under the *Environmental Protection Act*.[134] In such a case, the Minister of the Environment would likely wish to seek party intervenor status under Rule 13 in order to apprise the court of any facts or concerns relevant to either the question of standing in the injunction proceeding, or the merits of that proceeding, including the remedies that should be granted. We expect that a defendant in such a case will alert the relevant Minister to such proceedings, and that the Minister can then take steps to intervene as she sees fit.

However, since the Attorney General's approval will no longer be a precondition to civil proceedings, we are concerned that there could be cases where the Attorney General may be unaware that a proceeding to enjoin criminal conduct, which could interfere unduly with his prosecutorial discretion, has been commenced. It is unlikely that a defendant who may be engaged in criminal conduct would alert the Attorney General of such proceedings. We believe it is important that the Attorney General, or the Minister of the Crown responsible for the relevant legislation, should be notified of proceedings to enjoin criminal conduct, in order to have the opportunity to seek intervenor status. Accordingly, we recommend that a person who commences a proceeding to enjoin conduct that is an offence under a statute of the Legislative Assembly of Ontario or of the Parliament of Canada should be required to give notice of the commencement to the Minister who is responsible for the administration of the statute, except that in the case of the *Criminal Code* the notice should be given the Attorney General for Ontario. In addition, we recommend that further notice should be given to such other Minister as the court directs.[135]

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[134] R.S.O. 1980, c. 141.

[135] Draft Act, s. 4.

# CHAPTER 6

# COSTS

## 1. INTRODUCTION

The question of costs[1] is always of significance in the decision to bring or defend an action. No doubt other factors, such as ideology or idealism, may have an influence on individuals as well. However, the configuration of financial incentives and disincentives facing the parties would appear to be of decisive importance for persons who are acting with any degree of economic rationality.

From our examination of the present law governing costs, we have concluded that the costs rules generally applicable to civil proceedings in Ontario pose a formidable deterrent to litigation of the kind that our proposals are intended to facilitate, and thus may fatally undermine our recommendations for reform of the law of standing. Accordingly, we are of the view that alteration of the law of costs is necessary. In a later section of this chapter, we shall set forth the changes that we propose.[2]

We turn first, however, to a discussion of the present law and practice relating to costs in Ontario, which will explain why we believe fundamental change is warranted.

## 2. THE PRESENT LAW

We shall first discuss the costs payable to a successful party by his unsuccessful adversary, known as "party and party costs". We shall then consider the costs payable by a client to his own lawyer, which are commonly referred to as "solicitor and client costs" or "solicitor and own client costs".[3]

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[1] The expression "costs" refers to the total of lawyers' fees and disbursements incurred in litigation: *Formea Chemicals Ltd. v. Polymer Corp. Ltd.*, [1967] 2 O.R. 424, at 426-27, 53 C.P.R. 228 (T.O., S.C.O.).

[2] *Infra*, this ch., sec. 4.

[3] For a discussion of the terminology, see Orkin, *The Law of Costs* (2d ed., 1987), § 102.

### (a) Party and Party Costs

While Ontario courts have a wide jurisdiction to award costs under the *Courts of Justice Act, 1984*,[4] costs usually are awarded to a successful party. Indeed, so entrenched is the practice that "costs follow the event", it has come to be regarded as the general rule for party and party costs; in the absence of misbehaviour on the part of a litigant or her lawyer, a successful party recovers costs from his adversary and cannot be ordered to pay costs.[5]

In support of the general rule, two rationales are commonly given. One purpose of the rule is to indemnify the successful party for the costs of prosecuting or defending an action. In essence, this is a compensatory justification, as it characterizes the award of costs as compensation for litigation expenses, which have been occasioned by the fault of the unsuccessful party in persisting with the proceedings.[6]

The second rationale for the rule is that it discourages the pursuit of frivolous claims and the maintenance of specious defences, a rationale that serves both the interests of individuals and the larger public interest. Since an award of costs ordinarily depends on the outcome of proceedings, a person must very carefully evaluate the prospects of success on the merits before deciding whether to commence or defend an action, or to continue with a proceeding. Such a rule, then, encourages caution and deliberation.

Notwithstanding the general rule, there are well-accepted exceptions that support a denial of costs to a successful party, even in the absence of misconduct by litigant or lawyer. For example, courts may not award costs to any party where the issue determined is novel or where the court has interpreted ambiguous legislation.[7]

Where party and party costs are awarded to a successful party, usually it is a partial indemnity of the costs actually incurred, notwithstanding the compensatory rationale that is commonly cited in support of the rule. To the extent that

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[4] S.O. 1984, c. 11. See, also, Rules of Civil Procedure, O. Reg. 560/84, R. 57, as am. by O. Reg. 786/84, s. 1, para. 10. For a history of the party and party costs rule, see Gold, "Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority" (1977), 9 Ottawa L. Rev. 44, at 51-53.

[5] Rule 57.01(2) provides that "[t]he fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case". See, generally, Orkin, *supra*, note 3, § 206.

[6] See, for example, *Ryan v. McGregor* (1925), 58 O.L.R. 213, at 216, [1926] 1 D.L.R. 476 (App. Div.), where Middleton J.A. commented that "[t]he costs which are under discussion are in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought". See, also, Orkin, *supra*, note 3, § 204, and Jacob, "Access to Justice in England", in Cappelletti and Garth (eds.), *Access to Justice* (1978), Vol. I, Book I, at 440-41.

[7] See, generally, Ontario Law Reform Commission, *Report on Class Actions* (1982), Vol. 3, at 649, and Orkin, *supra*, note 3, § 205.2(2)(d).

costs are not indemnified, the successful party will be obliged to pay them to his own lawyer.

The amount of costs that is actually recoverable depends on the scale of costs that is ordered by the court. While there remains some uncertainty,[8] there seem to be two scales of costs—a party and party scale and a solicitor and client scale. The former is the one usually ordered, and provides a lesser degree of indemnification. Costs on the solicitor and client scale are awarded exceptionally as judicial disapproval of a party's conduct in the proceedings.[9]

While it cannot be predicted with certainty, there seems little reason to expect that courts will depart from the principles governing party and party costs in the context of litigation of the kind that our reform proposals is intended to allow.[10] Litigants can expect to have costs awarded against them if they lose.

However, litigation involving the *Canadian Charter of Rights and Freedoms*[11] may be an area where courts are becoming more circumspect about applying these principles. Decisions in Ontario and other jurisdictions indicate that some courts have evinced concern that Charter challenges not be deterred by the interposition of financial barriers to litigation. For example, in *Allman v. Commissioner of the Northwest Territories*, the court refused to award costs against unsuccessful applicants, and appeared to suggest that the costs follow the event rule should not apply inflexibly in Charter cases.[12] In Ontario, in *Canadian Newspapers Co. Ltd. v. Attorney-General of Canada*,[13] Osler J. commented that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden".[14] Recently,

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[8] See Orkin, *supra*, note 3, § 102. See, also, *Report on Class Actions*, *supra*, note 7, at 650.

[9] *Isaacs v. MHG International Ltd.* (1984), 45 O.R. (2d) 693, at 695, 7 D.L.R. (4th) 570 (C.A.), and *Foulis v. Robinson* (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (C.A.).

[10] The effect that the application of these principles might have was dramatically illustrated by *Palmer v. Nova Scotia Forest Industries* (1983), 60 N.S.R. (2d) 271, 2 D.L.R. (4th) 397 (S.C.T.D.). The court refused to grant an injunction that had been sought by fifteen landowners to prevent the defendant from spraying certain herbicides on Crown land, and ordered the unsuccessful applicants to pay the defendant's costs, which were estimated at approximately $500,000. Subsequently, it was reported that the defendant agreed not to claim its costs in return for an agreement by the plaintiffs not to bring an appeal: see "Herbicide legal tussle settled", in *Financial Post*, December 17, 1983, at 7.

[11] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[12] [1983] N.W.T.R. 231 (S.C.). See, also, *Harrison v. University of British Columbia* (1986), 30 D.L.R. (4th) 206, [1987] 2 W.W.R. 378 (B.C.S.C.).

[13] (1986), 56 O.R. (2d) 240, 32 D.L.R. (4th) 304 (H.C.J.) (subsequent reference is to 56 O.R. (2d)).

[14] *Ibid.*, at 242. Mr. Justice Osler also stated that "it is equally desirable that the Crown should not be treated as an unlimited source of funds with the result that marginal applications would be encouraged" (*ibid.*).

however, in *Lavigne v. Ontario Public Service Employees Union*,[15] while the Ontario Court of Appeal stated that receiving third party financial assistance by an individual applicant was not improper, it did order costs against the unsuccessful applicant.[16]

We understand that, depending on the circumstances, the Ontario government sometimes does not seek costs where it is successful in Charter litigation or other proceedings of a public interest nature. While this practice is laudatory, it does not dispel the threat of a financially damaging award of costs, which hangs over the litigant unless and until the proceedings have concluded, and the Crown has indicated that it in fact has waived costs.

### (b) Solicitor and Client Costs

The *Solicitors Act*[17] governs the payment of fees and disbursements by a client to his own lawyer. It regulates the contractual arrangements between lawyer and client by prescribing the kinds of agreement that are permissible and those that are prohibited. Moreover, the Act establishes a procedure for approval and review of certain types of permissible arrangement. Finally, the Act prescribes a procedure for the assessment of the costs that may be charged to a client.[18]

While solicitor and client costs may be assessed by an assessment officer,[19] a lawyer and client may wish to settle this matter by agreement. Under the

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15 (1989), 67 O.R. (2d) 536, rev'g *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86 (H.C.J.) (subsequent references are to 60 O.R. (2d)).

16 The Court of Appeal approved the following comments of White J., *supra*, note 15, at 525, in the court below:

> The Charter was designed to protect the ordinary Canadian, with his or her presumed limitation of funds, as well as those Canadians, corporations, unions or other bodies who have at hand sufficient funds to underwrite Charter litigation. Although I have no knowledge of Mr. Lavigne's personal finances, I would presume that he, like most other participants in the white collar, blue collar and the domestic work-forces of this province to say nothing of those not in the work-forces, would find Charter litigation an unaffordable luxury.

On the question of party and party costs, the Court of Appeal stated that "[i]n the circumstances, we see no reason why costs should not follow the event" (at 576). The circumstances were that all of the applicant's costs were paid by the National Citizens Coalition, which had also agreed to pay any costs ordered against the applicant, so far as it was able. Given the particular circumstances, it is difficult to extract a general principle from this case with respect to party and party costs.

17 R.S.O. 1980, c. 478.

18 See, generally, Ontario Law Reform Commission, *Report on the Solicitors Act* (1973) (hereinafter referred to as "Solicitors Act Report"), ch. 2.

19 The relevant factors appear in *Re Solicitors*, [1972] 3 O.R. 433 (T.O., S.C.O.), at 436-37. See, also, *Re Solicitors and Kozaroff* (1981), 21 C.P.C. 3 (T.O., S.C.O.).

*Solicitors Act*, a lawyer may make a written contract with her client concerning "the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by [her]".[20] An agreement respecting litigation may specify payment "by a gross sum . . . or by salary or otherwise".[21]

Since a lawyer is a fiduciary, it has been recognized that there is a need for supervision of agreements with her clients. Where an agreement concerns business done or to be done in a court, other than a small claims court, the lawyer is not entitled to receive payment "until the agreement has been examined and allowed by [an assessment officer] of a court having power to enforce the agreement".[22] If the assessment officer finds that the agreement is "not fair and reasonable", he may require the opinion of the court.[23] The court "may either reduce the amount payable under the agreement or order it to be cancelled" and order the services assessed "in the same manner as if the agreement had not been made".[24] Either party to an agreement may apply to the court to examine any question "respecting [its] validity or effect", and the court may enforce it or set it aside.[25] On the application, the court may enforce it if it appears that it "is in all respects fair and reasonable between the parties".[26]

Notwithstanding the clear statutory requirement of approval for agreements respecting business in court, as a matter of practice it has been generally ignored.[27]

In Ontario, fee arrangements involving a contingency element are rendered invalid by section 30 of the *Solicitors Act*.[28] While rooted in the common

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[20] *Supra*, note 17, s. 18(1). Section 17(b) of the Act defines "services" to include "fees, costs, charges and disbursements".

[21] *Ibid.*, s. 18(1). An agreement respecting non-contentious business or conveyancing may, in addition, provide for payment by commission or percentage: *ibid.*, s. 18(2).

[22] *Ibid.*, s. 19.

[23] *Ibid.*, s. 20.

[24] *Ibid.*, s. 21.

[25] *Ibid.*, s. 25. See *Re Solicitor*, [1972] 1 O.R. 694 (H.C.J.), rev'd [1973] 1 O.R. 652 (C.A.), and *Re Desrosiers and Konrad* (1974), 6 O.R. (2d) 300, 52 D.L.R. (3d) 524 (H.C.J.).

[26] *Solicitors Act*, *supra*, note 17, s. 26.

[27] Solicitors Act Report, *supra*, note 18, at 9 and 50-51.

[28] Section 30 provides as follows:

> 30. Nothing in sections 18 to 35 gives validity to a purchase by a solicitor of the interest or any part of the interest of his client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him is a percentage of the amount or value of the property recovered or

law prohibitions against maintenance and champerty, section 30 is, in fact, broader in its preclusive effect than the common law, insofar as any type of contingent payment arrangement is effectively proscribed.[29] In continuing officially to oppose contingency fees, Ontario is unique among the jurisdictions in Canada, for all of the other provinces and territories now permit contingency arrangements, subject to varying degrees of regulation.[30]

Despite the ban on contingent fees, as a matter of practice lawyers and clients do enter into *de facto* contingency arrangements, although these may not constitute formal contingent fee agreements. Some lawyers, particularly in personal injury suits, do accept cases on the understanding that payment will be forthcoming if the action is successful, but will not be sought or will be minimal should the action fail. A 1984 study has observed "that there is in fact a set of practices among many lawyers in Ontario that creates a system of fees that functions much like the American percentage fee system".[31]

In 1988, there was an important indication that the policy in Ontario might be reversed. The Law Society of Upper Canada recommended that contingent fees be permitted under a scheme of detailed regulation, to be the subject of further study.[32]

### (c) Government and Other Assistance

Our consideration of the law and practice relating to costs in Ontario would be incomplete without recognition of the possible impact of the Ontario Legal

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preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

Section 30 is reinforced by s. 2 of *An Act respecting Champerty*, R.S.O. 1897, c. 327, which both forbids and renders invalid "champertous agreements". It can be found in Appendix A of Volume 9 of the 1980 R.S.O.'s. In addition, the Rules of Professional Conduct of The Law Society of Upper Canada enjoin its members to follow the rules respecting contingent fees established by the *Solicitors Act*: The Law Society of Upper Canada, *Professional Conduct Handbook* (1987), Rule 9, para. 10.

29 In the *Report on Class Actions*, *supra*, note 7, at 654, the Commission explained that "in other jurisdictions, there are statements that, at common law, it is not improper for a lawyer to agree that he will seek his costs out of a damages award, or that he may advance disbursements on the understanding that he will be reimbursed out of the damages if the action is successful, but will not recover them if the action fails". Under s. 30, neither type of arrangement would be allowed in Ontario.

30 See, generally, Canadian Bar Association - Ontario, Contingent Fees Committee, *Opening Doors or Stirring Up Strife*[:] *The Implementation of Contingent Fees in Ontario* (1988), at 31-37.

31 Kritzer, "Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario" (1984), 47 Law & Contemp. Probs. 125, at 130. See, also, Law Society of Upper Canada, *Report of the Special Committee on Contingency Fees* (1988), which states (at 1) that "[m]any lawyers in Ontario are already operating on a de facto contingency basis".

32 See The Law Society of Upper Canada, *Summary of Proceedings, Matters Before Convocation — May 26th and 27th, 1988* (1988), at 29-30.

Aid Plan and other potential sources of financial assistance to prospective litigants. Funds to defray the expense of litigation may be available from bodies established under government auspices or from private organizations. Within the former category are the Ontario Legal Aid Plan and the federal government's Court Challenges Program; examples of the latter include the Women's Legal Education and Action Fund and the Canadian Environmental Defence Fund. While, apart from the Ontario Legal Aid Plan, the aid provided by these sources may not, strictly speaking, be regarded as part of the law of costs in Ontario, each may have a significant influence on the practical operation of that law, to the extent that it facilitates the initiation or continuation of proceedings that otherwise would not be commenced or would be aborted. Moreover, for persons having non-traditional legal interests they may be critical. It is therefore important, especially in the context of litigation involving this type of interest, to discuss the availability of funds from other sources. We shall turn first to the Ontario Legal Aid Plan.

Generally speaking, the purpose of the Ontario *Legal Aid Act*[33] is to ensure that individuals are not denied legal representation in litigation or prevented from securing legal advice due to impecuniosity. Under the Ontario Legal Aid Plan, a person who qualifies for assistance chooses his lawyer from a panel containing the names of those lawyers willing to accept legal aid certificates. From the time of acceptance, the normal solicitor-client relationship subsists. When the matter is fully resolved, however, the lawyer submits his bill to the Plan, instead of to his client, and is paid according to the tariffs contained in schedules to the regulations promulgated under the *Legal Aid Act*.

Under the Ontario Legal Aid Plan, a sub-committee of the Legal Aid Committee, known as the "Sub-Committee Re Group Applications and Granting of Certificates for Test Cases", reviews any application for a legal aid certificate that might reasonably be considered a group application, an application on behalf of a class, or an application in respect of a test case. Its mandate is to make recommendations whether legal aid should be granted. In June, 1985, the sub-committee adopted a set of guidelines which, in part, is set out below:[34]

**1. Financial**

(a) Does the individual qualify for Legal Aid?

(b) Do members of the group qualify for Legal Aid?

(c) What means does the group have of privately funding the case?

(d) What effort has been made by the applicant to raise funds privately and what effort will the applicant make to do so in the future?

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[33] R.S.O. 1980, c. 234.

[34] The Law Society of Upper Canada, Ontario Legal Aid Plan, *1986 Annual Report* (1986), at 14. The guidelines were approved by Convocation on October 25, 1985.

(e) Has the applicant explored the possibility of funding by other organizations?

**2. Novelty, Repetition, Issue Being Argued By Others**

(a) Has a Court or Tribunal already ruled on the issue?

(b) Is another person or group litigating or likely to litigate the issue?

(c) Would the applicant be prejudiced if someone else chose to argue the issue, and is there someone in that position?

**3. Significance, Importance**

(a) What is the significance or importance of the issue to the applicant or others?

. . . .

**6. Test Cases**

(a) Benefit of successful application must flow to many others;

(b) Enquiry as to whether other avenues of relief have been pursued.

Where legal aid is made available to a party, the normal party and party costs rule nonetheless applies, so that a recipient of legal aid will be *prima facie* liable to pay costs awarded against him in the event of failure.[35]

Another possible source of funds for litigants is the Court Challenges Program, which has been administered by the Canadian Council on Social Development ("CCSD")[36] since September, 1985 under an agreement with the Secretary of State and the Minister of Justice. Under the Program, funds may be granted to individuals and non-profit groups bringing challenges under section 93 or 133 of the *Constitution Act, 1867*,[37] section 23 of the *Manitoba Act, 1870*[38] and the following provisions of the *Canadian Charter of Rights and Freedoms*: section 15 (equality rights), sections 16 to 23 (minority language

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[35] The regulation to the *Legal Aid Act*, O. Reg. 59/86, s. 116, allows a legal aid client who is unsuccessful to apply to the Plan for payment of such costs. Furthermore, if he refuses or fails to apply for payment within a reasonable time, the party to whom costs have been awarded may make application. Applications are made to a special subcommittee. We understand that few applications have been made by either party.

Guidelines for applications under Part X were approved by Convocation on May 18, 1973. For a discussion, see *Re McFarland and Law Society of Upper Canada* (1973), 2 O.R. (2d) 704 (Div. Ct.).

[36] For a description of the Court Challenges Program, see Canadian Council on Social Development, *Court Challenges Program Annual Report 1986/87* (1987) (hereinafter referred to as "Court Challenges Annual Report"). See, also, "Here's how Charter challenges can be funded" (1987), 3 Can. Hum. Rts. Advocate 10.

[37] 30 & 31 Vict., c. 3 (U.K.).

[38] 33 Vict., c. 3 (U.K.).

rights), section 27 (multiculturalism),[39] and section 28 (equality of the sexes).[40] With respect to sections 15, 27, and 28 of the Charter, financial assistance is available only where a case will test federal legislation, policies, and practices. As defined by the memorandum of agreement with the federal government, the mandate of the Court Challenges Program does not comprehend litigation relating to provincial legislation, policies, or practice based on these provisions.

Depending on the constitutional provision in issue, applications for funding are determined by either the Equality Rights Panel or the Language Rights Panel. In discharging this responsibility, both Panels operate independently of the CCSD.

Criteria for selection of test cases for funding are prescribed by the agreement with the federal government. In the course of this discussion, we have already identified two of the threshold prerequisites: first, that the application relate to cases that will test certain language rights or federal legislation, policies, and practices based on sections 15, 27, and 28, of the Charter; and second, that the recipient must be an individual or non-profit group. Among the remaining criteria are the following:[41]

2. The issue should be one of substantial importance and have legal merit.

3. The issue should have consequences for a number of people.

4. Duplication should be avoided; thus, when a legal issue is before the courts, another person espousing the same cause in the same or another case should not receive financial assistance.

5. In general, because intervenors do not have carriage of the action, they should not be funded.

6. In dealing with equality cases, priority should be accorded to the funding of cases having national importance to disadvantaged groups as identified in subsection 15(2) of the Charter.

Generally, a maximum of $35,000 is available for each stage of litigation (that is, trial, appeal, and appeal to the Supreme Court of Canada). However, in exceptional circumstances, greater amounts may be authorized, based on the factual or legal basis of the litigation.

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[39] Funding is available in relation to s. 27 to the extent that an argument based on s. 27 is made in support of arguments based on s. 15.

[40] When it was established in 1978, the Court Challenges Program provided assistance only in relation to challenges based on s. 93 or s. 133 of the *Constitution Act, 1867* or s. 23 of the *Manitoba Act, 1870*; in 1982, it was expanded to include ss. 16 to 23 of the Charter, and in September, 1985, following a review, it was extended to comprehend ss. 15, 27 and 28.

[41] Court Challenges Annual Report, *supra*, note 36, at 10.

### (d) Conclusions

Having outlined the law and practice relating to costs in Ontario, it remains to state our conclusions about the expected effect of the existing costs regime on the reform proposals that we made in chapter 4.

The party and party costs rule is considered to discourage litigation generally. That it does, in fact, have this effect has been supported, at least until recently, only by personal experience and anecdotal evidence.[42] In recent years, however, this conclusion has been buttressed by theoretical analyses of the differential effects of alternative costs rules.[43] These studies grew, in part, out of an interest to compare the party and party costs rule (the so-called "two way rule") with the American rule that costs are not shifted to a losing party (the "no way rule").[44]

Comparative analysis of the no way rule and the two way rule indicates that it is difficult to make general predictions about the relative overall effects of these rules on the likelihood that proceedings will or will not be initiated.[45] When, however, certain important situational factors are considered, predictions can be made with much greater assurance. These factors concern the characteristics of the opposing parties, the potential costs in relation to the parties' economic stake in the litigation, and the parties' estimate of the strength of their individual cases. With respect to the first of these, it is critical whether a party is a so-called "one shotter", that is, a person involved in litigation in a single instance, or a repeat player, usually an institution that is involved in litigation on a more regular basis, for this will in large measure determine whether a party is risk averse[46] which, in turn, will influence her response to various incentives. "One shotters" generally are risk averse, while "repeat players" are risk neutral.[47]

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[42] Gold, *supra*, note 4, at 59, for example, states that "[t]he risk of a costs order upon defeat inhibits the bringing of *all suits*, just and otherwise" (emphasis in the original). See, also, Kritzer, *supra*, note 31, who drew his conclusions from interviews.

[43] See, for example, Shavell, "Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs" (1982), 11 J. Legal Studies 55; Rowe, "Predicting the Effects of Attorney Fee Shifting" (1984), 47 Law & Contemp. Probs. 139; Braeutigam, Owen, and Panzar, "An Economic Analysis of Alternative Fee Shifting Systems" (1984), 47 Law & Contemp. Probs. 173 (hereinafter referred to as "Braeutigam"); and Hutchinson, "The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored" (1981), 19 Osgoode Hall L.J. 473, at 481-94.

[44] For a discussion of the American rule, see Leubsdorf, "Toward a History of the American Rule on Attorney Fee Recovery" (1984), 47 Law & Contemp. Probs. 9.

[45] See Rowe, *supra*, note 43, at 147.

[46] Shavell, *supra*, note 43, at 58, explains that "a *risk-averse* party is one for whom uncertainty itself is undesirable" (emphasis in the original).

[47] See, generally, Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1979), 9 Law & Soc. Rev. 95.

With respect to the second factor, a party's concern about litigation increases as potential expenses increase relative to his economic stake in the litigation or, in the case of proceedings seeking non-monetary relief, the perceived importance of the relief sought. The third factor—the parties' respective estimates of the strength of their cases—generally affects attitudes to the commencement and continuation of proceedings and interacts with the other factors.

Against this background, certain conclusions may be drawn about the impact of the two way costs rule. Where potential plaintiffs are risk averse, the party and party costs rule is a major deterrent to the initiation of proceedings, irrespective of the substantive merit of prospective claims. Risk aversion is an attribute of individuals of modest means and persons who are "one shotters", particularly where small claims for damages are in issue; but it may be an attribute of a litigant without these characteristics.[48]

There can be little, if any, doubt that the costs rules in Ontario will have a deterrent effect on the commencement of the litigation that will be facilitated by our proposals for reform of the law of standing. Indeed, applying a test of economic rationality, these costs rules would appear to be a preclusive deterrent because a prospective plaintiff will face a potential costs liability that exceeds the value of her financial interest, which, in many cases, will be negligible or nil. Such will be the case even where the action is successful, unless the burden of solicitor and client costs is assumed by others. The possible availability of funds from the Ontario Legal Aid Plan or the federal Court Challenges Program, or indeed, from another source, does not alter our general conclusion, for a prospective plaintiff in receipt of financial assistance nonetheless remains liable, if unsuccessful, to an order of party and party costs against her. Nor is this conclusion affected by the fact that, in the context of Charter litigation, a few decisions have evinced a benign attitude to plaintiffs, since it cannot be said that a judicial position has emerged. Moreover, because relief from an order of party and party costs depends on a favourable exercise of the court's discretion at the end of the proceedings, the uncertainty of costs liability will remain until that decision. Even if a trend were to emerge, Charter litigation is but one, albeit important, field of litigation, and our standing proposals extend far beyond it. Finally, even though the Ontario government on occasion does not ask for costs in "public interest" litigation, the threat of costs is only removed at the end of the proceedings once the Crown's decision has been taken.

Finally, we give little weight to the possibility that a prospective plaintiff will be able to collect voluntary contributions sufficient to pay both his solicitor and client costs and any award of party and party costs made against him. It would appear very doubtful that this is an efficacious means of financing litigation due to what is popularly known as "the free rider problem":[49] where potential

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[48] See, generally, Shavell, *supra*, note 43, and Rowe, *supra*, note 43.

[49] See, for example, Trebilcock, "Winners and Losers in the Modern Regulatory System[:] Must the Consumer Always Lose?" (1975), 13 Osgoode Hall L.J. 619, at 624-27. The force of the "free rider" analysis was accepted in our *Report on Class Actions*, *supra*, note 7, at 657-58.

contributors can enjoy whatever benefits can be secured by an action without payment and without incurring risk, they ordinarily will not donate funds voluntarily. This will almost invariably be the case in proceedings advancing non-traditional legal interests.

We recognize that the free rider argument does not recognize motivations for contribution other than economic self-interest. Some individuals, for example, may donate funds out of a certain ideological commitment or a sense of outrage against a defendant. Nonetheless, the basic validity of the free rider argument remains, since the practical reality is that idealism and altruism will result in fewer donations than does economic self-interest. Solicitation of contributions also involves transaction costs, which may have to be absorbed personally by the individual requesting donations should insufficient funds be collected.

The difficulties associated with reliance on private contributions may be exacerbated in the case of the plaintiff who is engaging in "one shot" litigation. Organizations, such as the Consumers' Association of Canada or the Canadian Environmental Law Association, that engage in fundraising on a continual or periodic basis can distribute, rationalize, and thereby reduce, the transaction costs of solicitation. For the individual litigant, such economies are unattainable. A further problem for the individual litigant, as distinct from the organizational litigant, is the absolute necessity of collecting funds sufficient to cover both his solicitor and client costs and his potential liability to pay party and party costs before the action is commenced or, at the very latest, prior to its conclusion. Otherwise, should the action prove unsuccessful and should he be ordered to pay the party and party costs of his adversary, he will be faced with the unenviable task of attempting to secure donations to indemnify him in respect of a losing action. Measured against the economic logic of the "free rider" argument, in such circumstances contributions would be most unlikely.

Before leaving the matter of contributions, there is a final comment that we wish to make. At common law, a person giving financial support to a plaintiff, without a lawful justification, might be found to have committed the tort of maintenance for which he would be liable in damages to the defendant. While in theory this archaic tort remains part of Ontario law, we doubt whether it has any vitality or practical effect. Canadian courts have interpreted maintenance narrowly, virtually requiring proof that the "maintainer" fomented the proceedings.[50] Based on the English cases,[51] it would appear that the scope of lawful justification for supporting litigation has been given a wide interpretation.

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[50] *Newswander v. Giegerich* (1907), 39 S.C.R. 354; *Goodman v. The King*, [1939] S.C.R. 446, [1939] 4 D.L.R. 361; and *Wiegand v. Huberman* (1979), 18 B.C.L.R. 102, 108 D.L.R. (3d) 450 (S.C.). For a discussion, see *Report on Class Actions*, *supra*, note 7, at 716-21.

[51] In England, the Law Commission recommended the abolition of maintenance as a crime and a tort. It stated that "the action for damages for maintenance is today no more than an empty shell": England, The Law Commission, *Proposals for Reform of the Law Relating to Maintenance and Champerty*, Law Com. No. 7 (1966), para. 11, at 5. In 1967, this recommendation was implemented by the *Criminal Law Act 1967*, c. 58 (U.K.), ss. 13 and 14.

Finally, it bears emphasizing that, in the context of Charter litigation, the Ontario Court of Appeal has accepted "that there is nothing improper in an applicant receiving the support of an organization".[52]

Our conclusions about the impact of the law of costs are supported by the policies that have been adopted in recent years in connection with administrative proceedings. Certain administrative boards in Ontario and elsewhere in Canada have accepted that, without costs awards, the public participation that is thought to be crucial to their legitimacy and effective functioning will be discouraged. In Ontario, the necessity of providing costs awards has been endorsed by the Ontario Energy Board[53] and by joint boards under the *Consolidated Hearings Act, 1981*.[54] Recently, the Ontario Legislature enacted the *Intervenor Funding Project Act, 1988*,[55] which is designed to assure public participation in the proceedings of certain administrative tribunals.

In turning to the administrative context for support for our conclusion concerning the effect of the existing costs rules, what we find particularly interesting is the connection between the decision to allow liberal standing—and, indeed, in that context, the importance of participation—and the concern about the interposition of economic barriers. Reliance on costs awards is considered necessary to render practicable and effective the participation of groups or interests that otherwise lack sufficient resources. Support for costs awards, then, follows from the approach that is taken to standing.

Having concluded that the current law and practice relating to costs will deter the very types of proceeding that our standing proposals are intended to facilitate, we now turn to approaches to costs that have been taken in jurisdictions that have considered reform of the law of standing.

## 3. APPROACHES IN OTHER JURISDICTIONS

Of the several law reform reports on the law of standing in the Commonwealth, only the Report of the Australian Law Reform Commission addressed the possible impact of costs.[56]

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[52] *Lavigne v. Ontario Public Service Employees Union*, *supra*, note 15, at 575.

[53] *In the matter of a hearing under the Ontario Energy Board Act Regarding the Awarding of Costs and Related Procedural Matters* (E.B.O. 116, June 12, 1985).

[54] See, for example, *Re Ontario Hydro Southwestern Ontario Bulk Electricity Undertaking (No. 2)* (1982), 14 O.M.B.R. 333, 11 C.E.L.R. 53, and *Re Victoria Hospital Corporation Energy From Waste Facility* (1983), 15 O.M.B.R. 129.

[55] S.O. 1988, c. 71.

[56] Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985) (hereinafter referred to as "Australian Report"). The Law Reform Commission of British Columbia does not address this issue at all: see Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, LRC 46 (1980). The New Zealand Public and Administrative Law Reform Committee, without any supporting

The Commission dealt with three issues relating to costs: (1) the payment of costs by the Attorney General, with particular reference to relator actions; (2) public funding; and (3) the common law rule against maintenance. Given our recommendation effectively abolishing the relator action in Ontario,[57] the first of these issues is not directly relevant to the concerns in this chapter.

Before examining each of these issues in turn, the Australian Commission explained the significance of costs rules to its proposals to expand the substantive basis of standing:[58]

> 307. *Issues Raised by Standing Reform*. The recommendations made in this Report for reform of the law of standing envisage an enhanced role for private citizens in initiating public interest litigation. If citizens are to be able to fulfil this role, any unnecessary barriers erected by the law of costs should be removed. This is not to say that public interest plaintiffs should be totally free from the discipline which the prospect of having to pay legal costs imposes on them. If they could sue in the knowledge that their own financial resources, however substantial, would not be at risk to any degree, they would be in a highly favoured position compared with most plaintiffs in other types of litigation and the risk of unmeritorious and ill-conceived claims might increase significantly. But to the extent that rules relating to costs, through being based on the traditional assumption that civil litigation has solely to do with the enforcement of private rights and duties, may fail to accommodate the relatively new phenomenon of public interest proceedings brought by individual citizens, it is appropriate to consider whether these rules need to be altered in conjunction with the extension of standing rights for such citizens. If appropriate changes are not made, the extension of standing rights may have little practical effect.

After discussing whether costs should be awarded against the Attorney General, the Commission turned to public funding. It began by focusing on the public interest element inherent in the litigation that would be facilitated by its standing reforms:[59]

> 320. *Public Interest Litigation and Public Funding*. The proposed standing reforms are based on the principle that it is right and proper for individual citizens and groups to take proceedings in the public interest, even though they may themselves have no personal stake in the litigation. On account of the high costs of litigation, these citizens and groups may often lack the financial resources needed to pursue a case to its conclusion. Even if they do have the necessary resources, they may consider that, because resolution of the issues raised will be of benefit to a significant section of the public, if not the public as a whole, it is unfair that they alone should have to bear the cost of the litigation in the event of their claim failing.

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discussion, simply lauded the court's power to award costs as "a considerable deterrent" against the possibility that a multiplicity of suits might be brought as a result of more liberalized standing rules: see New Zealand Public and Administrative Law Reform Committee, *Standing in Administrative Law*, Report No. 11 (1978), para. 46, at 26.

[57] *Supra*, ch. 4, sec. 1.

[58] Australian Report, *supra*, note 56, para. 307, at 162-63.

[59] *Ibid.*, para. 320, at 168.

> Where the decision in the case clarifies a point of law of public importance, or relates to a large-scale enterprise or activity of general public concern, it may confer a benefit on the public irrespective of whether the claim has failed or succeeded . . . . Taken to its extreme, this approach would lead to the conclusion that any legal claim by private plaintiffs falling within the description 'public interest litigation' should qualify for public funding because of the public interest factor, irrespective of the means of the plaintiff and the merits of the claim.

The Commission emphasized that it did not endorse the "extreme" position that every plaintiff bringing "public interest litigation" should receive public funding.

It then examined the availability of legal aid under federal and state legislation. The Commission observed that, under certain schemes, the basis for the provision of legal aid appeared to be premised on a traditional conception of standing, which was opposed to the philosophy adopted in its report. For example, to the extent that the availability of legal aid would depend on a finding that the applicant would benefit individually from the claim, assistance would be precluded if "the applicant is a wholly disinterested plaintiff suing to enforce a public right".[60] Furthermore, the means test that is applied to applicants was considered inappropriate in the context of public interest litigation because it disregarded the fact that, even though the plaintiff might have had the means, he did not stand to gain personally from the litigation.[61] Accordingly, the Commission recommended that the legal aid legislation should be amended to "take adequate account of the special features of public interest litigation",[62] and in particular, to consider whether the proceedings for which aid was being sought would benefit the public.

The Commission then turned to consider maintenance, which it defined as "the giving of assistance or encouragement, whether financial or otherwise, to one of the parties to civil litigation by a person who has no interest in it nor any other motive recognised by the law as justifying the interference".[63] At common law, maintenance was both a criminal offence and a tort, the latter rendering the person giving assistance liable in damages. An agreement for maintenance is unenforceable by either party, since it is illegal and against public policy.

The Commission regarded the law of maintenance as inconsistent with its basic recommendations:[64]

> 336. *Anomalies Resulting from Reform of Standing*. The Commission's principal recommendations regarding standing have the effect of widening the class of

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[60] *Ibid.*, para. 327, at 171.

[61] *Ibid.*, para. 329, at 172.

[62] *Ibid.*, para. 334, at 175.

[63] *Ibid.*, para. 335, at 176-77.

[64] *Ibid.*, para. 336, at 177-78.

> persons who are entitled to institute legal proceedings for declarations or injunctions, invoke the prerogative writs or claim statutory relief. Specifically, they envisage actions of these types being brought in the public interest by persons who have no personal interest at stake. If the law of maintenance were to remain unaltered, the curious result would follow that a person who would be able to institute proceedings in his or her own name would not be able to contribute to the cost of similar proceedings which related to exactly the same subject-matter but had been instituted by someone else. This would be an anomalous result, especially considering the public nature of the types of proceedings involved. There is no justification in principle for preventing a person who is able to institute proceedings from supporting the same proceedings taken by another. To do so would be to require all who wished to support the action to become parties to the proceeding.

Notwithstanding its disapproval, the Commission did not favour complete abolition of maintenance. One reason was that it did not wish to be seen as endorsing the abolition of champerty, a subject, it advised, that would be examined in its forthcoming report on class actions. The Commission therefore recommended "that maintenance, except where it amounts to champerty, be abolished as a crime, as a tort and as the basis of a defence to an action for breach of contract".[65]

Little attention was given to the risk of party and party costs, notwithstanding that the Commission's discussion began with an explicit recognition of the practical impact of costs on its proposals to reform the law of standing. The Commission simply acknowledged the disincentive effect of a prospective order to pay costs. It recommended that plaintiffs entitled to receive legal aid should not be subject to "an unduly burdensome order for payment of the successful party's costs".[66] Presumably, persons who did not receive legal aid would remain liable for the party and party costs of their adversaries.

## 4. PROPOSALS FOR REFORM

### (a) Introduction

In chapter 4, we made recommendations to reform the substantive basis of standing in Ontario. As we explained, one of our purposes in making these proposals was to allow a broader range of issues of public importance to be brought before the courts for adjudication. Earlier in this chapter, we concluded that, under the present costs regime in Ontario, many, perhaps even most, plaintiffs will be discouraged from commencing proceedings raising issues of this nature. Without recapitulating that discussion, suffice it to state that, where plaintiffs lack a personal, proprietary, or pecuniary interest in the litigation, or where they possess such an interest, but its value is exceeded by the potential expense of the litigation, they will be effectively deterred. This deterrent effect

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[65] *Ibid.*, para. 341, at 180.

[66] *Ibid.*, para. 334, at 176.

threatens to frustrate the standing reforms that we have proposed. In the absence of an economic interest in the outcome of the proceedings, any plaintiff, but particularly an individual with limited financial resources, is in a disadvantageous position in relation to a defendant, who is usually a major actor—a government, a large corporation, or trade union. As a result, a person's right of standing, in practice, may be an empty one.

However, not all litigation of issues having a widespread impact will necessarily involve a problem of access. Where a plaintiff has an economic interest in the proceedings of a magnitude that exceeds the potential expense of the proceedings, a disincentive to litigation cannot be said to exist.[67] Rarely will we find this situation in "public interest" litigation.

We are concerned, therefore, about the economic barrier that the existing costs rules will represent for many of those wishing to take advantage of our standing proposals. From this concern arises two interrelated questions. First, in what circumstances is it justifiable to alter the costs rules in order to surmount that barrier? Second, how should the costs rules be changed to achieve that objective? In the balance of this chapter, we shall address these questions. We shall begin by identifying the circumstances in which, we believe, the costs rules warrant amendment. We shall then consider alternative methods of changing the costs regime, and make our proposals for reform, which address both party and party costs and solicitor and client costs. Finally, we shall deal with certain ancillary costs issues—security for costs, offers to settle, and the costs of interlocutory proceedings.[68]

We turn first to discuss the circumstances in which the costs regime should be changed.

Our basic concern that access to the courts should not be effectively undermined suggests a combination of four prerequisites, which together define when a departure from the existing rules is justifiable. We shall discuss three of the criteria at this juncture. We shall later discuss a fourth criterion, which focuses on the characteristics of the defendant, and follows from the particular departure from the costs rules we propose.

The first prerequisite reflects the main rationale for reforming the standing rules: certain issues should not unjustifiably be prevented from being adjudicated. Thus, we recommend that the costs rules should be changed where the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved.[69] We acknowledge that this is a very

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[67] However, as explained earlier, in determining the effect of the costs rules on an individual litigant, various factors must be taken into account, most notably, whether, and the extent to which, a prospective plaintiff is risk averse: see discussion *supra*, this ch., sec. 2(d).

[68] Costs relating to intervention will be discussed *infra*, this ch., sec. 5.

[69] See the Commission's proposed *Access to Courts Act* (hereinafter referred to as "Draft Act"), s. 5(1)(a). The Draft Act appears as Appendix 1 of this report.

general statement of principle. However, in focusing on the larger significance of the issues it does identify what we regard as a crucial factor.

Under certain circumstances, this factor may comprehend an action brought by a person with a traditional legal interest. However, an ordinary action alleging a breach of contract or negligence would not satisfy it, unless it contained significant issues that transcended the litigation itself. The mere impact of proceedings through *stare decisis* should not be sufficient in itself to bring a proceeding within this criterion.

The second prerequisite follows from our fundamental concern about access to the courts. That concern, of course, extends only to those prospective plaintiffs who would be deterred from litigation by the existing costs regime. We are therefore not concerned with plaintiffs whose interest in the proceedings, in nature and degree, constitutes a sufficient counterweight to the disincentives inherent in the existing costs regime, especially the party and party costs rule. Accordingly, the second criterion we recommend is that the person has no personal, pecuniary or proprietary interest in the outcome of the proceeding, or, if he has such an interest, it clearly does not justify the proceeding economically.[70]

By including a plaintiff who has a personal, pecuniary, or proprietary interest, but one that does not justify the litigation economically, this criterion would extend favourable costs treatment to persons having traditional legal interests. While our proposals to reform the law of standing are directed primarily at litigants who lack traditional legal interests, we are of the view that our costs reforms should comprehend plaintiffs raising equally important issues, but who remain effectively foreclosed from litigating by a costs barrier. As an example of circumstances in which this criterion might be applied, we suggest the unsuccessful class action brought in *Naken v. General Motors Ltd.*,[71] where the plaintiffs raised important questions about the interpretation of the class action rule, but personally stood to gain only $1,000.

The third criterion reflects our concern that the present costs rules will prevent certain important issues from being litigated at all. Accordingly, if the issue has already been adjudicated, there is no reason to assist a person wishing to initiate another action respecting the same issue. For example, where a court has already refused an injunction sought by a canoeist to enjoin activity causing pollution, another canoeist subsequently bringing a similar proceeding raising identical issues should not be able to receive favourable costs treatment. Hence, we recommend that the third criterion should be that the issues have not been previously determined by a court in a proceeding against the same defendant.[72]

Having identified the circumstances in which it is appropriate to alter the costs regime to remove the disincentive to litigation, we considered two

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[70] *Ibid.*, s. 5(1)(b).

[71] [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385.

[72] Draft Act, s. 5(1)(c).

possible approaches to reform: relying on a government fund, and changing the existing costs rules. We have concluded that the latter alternative is preferable, and that a government fund cannot be regarded as a sufficient solution. Before outlining our recommendations for party and party costs and solicitor and client costs, we wish to state the reasons for this choice.

The argument in favour of a government fund is relatively simple: since the plaintiffs seek to bring proceedings that will raise important issues, the resolution of which can affect, and are intended to benefit, many others, the general public should defray their expenses.[73]

We consider that providing funds to plaintiffs who meet our criteria is a partial solution at best. The financial difficulty facing a prospective plaintiff is not only the burden of paying his solicitor and client costs—the costs usually subsidized by government schemes, such as the Ontario Legal Aid Plan and the Court Challenges Program—but the risk of paying the party and party costs of the defendant, should the action fail. Unless a plaintiff were assured that a government fund would reimburse the latter costs, it is doubtful whether, given the nature of his interest in the litigation, she would initiate proceedings. Such a requirement would, in essence, constitute a policy in favour of underwriting the entire cost of litigation for unsuccessful plaintiffs. We doubt whether a government would, or should, undertake a commitment on this scale, particularly where it would involve a new class of claimants.[74]

Moreover, the establishment of a new funding entity, distinct from the Ontario Legal Aid Plan, would involve additional costs in organizing and maintaining a separate administrative structure. These costs would be mitigated somewhat if the mandate of the Ontario Legal Aid Plan were extended to embrace these claims.

Furthermore, another, not unrelated, problem with exclusive reliance on a government fund is that the periodic decisions to allocate moneys for this purpose might depend on potentially changing political exigencies, rather than on legitimate need. Should the resolve to facilitate "public interest" litigation flag, or other priorities intervene, funding might be reduced or even discontinued.

Therefore, we have concluded that, while a government decision to provide financial assistance to prospective plaintiffs would certainly be welcome, we cannot recommend a government fund as the primary means of ensuring access

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[73] In the *Report on Class Actions*, *supra*, note 7, at 713, we rejected a government fund for the philosophical reason that, since class actions were to be initiated privately rather than by a government official, financial responsibility for them should rest on private citizens. Apart from this principled objection, we identified certain practical difficulties that, in our view, would attend the establishment of a government fund.

[74] A legally aided client against whom party and party costs are awarded may apply to the Plan for a payment to defray these costs: see *supra*, note 35.

to the courts. Rather, reform should focus on the rules governing party and party costs and solicitor and client costs, and it is to each of these matters that we now turn.

### (b) Party and Party Costs

Earlier in this chapter, we concluded that the party and party costs rule will present a formidable deterrent to litigation by persons advancing non-traditional legal interests.[75] While the burden of paying solicitor and client costs may occasionally be alleviated, in whole or in part—for example, if a lawyer were willing to represent the plaintiff on a *pro bono* basis, or if financial assistance were provided from government or other sources—the risk of an order of party and party costs nonetheless would remain. Should the threat of an adverse costs award continue to apply, our standing reforms will have little, if any, effect. The potential costs liability of a plaintiff must therefore be removed.

In coming to this conclusion, we observe that we are not alone. Several proposals have been made in Ontario to abrogate the party and party costs rule.[76] Of these, we were particularly impressed by the proposals in the 1974 *Report of The Task Force on Legal Aid*.[77] Its position can best be represented by quoting its argument:[78]

> The question of legal costs generally, and the extent to which they should be awarded by courts or tribunals, cannot really be said to be included in our mandate.

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[75] *Supra*, this ch., sec. 2(d).

[76] In its 1978 Brief to the Civil Procedure Revision Committee, entitled "Costs, Undertakings and Public Interest Costs", the Canadian Environmental Law Research Foundation made the following proposal (at 10):

> The Canadian Environmental Law Research Foundation recommends that in cases where the plaintiff has no personal or financial property interest to protect or where the potential financial loss that may be incurred by litigating is greater than the potential financial gain, or where the plaintiff in a private litigation seeks to vindicate a significant public policy and to create a widespread benefit, the court should award costs in favour of such a plaintiff regardless of whether he wins or loses his case, but not against him.

A Private Member's Bill, *An Act to establish an Environmental Magna Carta for Ontario*, Bill 91, 1980 (31st Leg. 4th Sess.), which provided, *inter alia*, for individual standing to enforce environmental standards, contained the following costs provision:

> 11. Where a person or public interest group raises a matter of importance relating to the protection and conservation of the environment, a judge shall not award costs against the person or group notwithstanding that the person or group is not successful in the proceeding.

[77] Ontario, *Report of The Task Force on Legal Aid, Part I* (1974) (hereinafter referred to as "Osler Task Force on Legal Aid").

[78] *Ibid.*, at 99-100.

> However, we are emboldened to suggest at this point that it is no longer self evident that costs should follow the event. So much of today's litigation involves contests between private individuals and either the state or some public authority or large corporation that the threat of having costs awarded against a losing party operates unequally as a deterrent. The threat of costs undoubtedly works heavily against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake. We would therefore propose an amendment to The Legal Aid Act casting upon a successful respondent in any such proceedings the burden of satisfying the court or tribunal before costs are awarded in his favour that no public issue of substance was involved in the litigation or that the proceedings were frivolous or vexatious.
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> [T]he spirit underlying the principle of Legal Aid and today's legislative recognition that public participation is desirable when serious public issues are at stake, justify a departure from the rule . . . . The deterrent threat of being mulcted in costs is often more than enough to inhibit a group of genuinely concerned citizens from proceeding against a public authority or a large corporation though vital public issues may be at stake.
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> We have no doubts about the equity of the principles we have proposed which tend to ensure that groups demonstrating a *bona fide* concern for matters affecting the public interest will not be penalized in costs if their efforts are unsuccessful. But to give such protection only to legally aided groups would give them an unwarranted advantage over others. Each such group might well be serving the public interest by testing public rights but the price of failure could be ruinous for even a wealthy group in the absence of such a rule as we propose.
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> We have more than once expressed the view that to grant nominal rights is worse than useless unless the means of enforcing them are also provided. Reasonable immunity from the penalty of costs should properly follow the assertion of such rights by a legally aided group; in equity this same immunity should be extended to non-legally aided groups on the same conditions.

Once there is a preliminary decision that the costs liability of plaintiffs should be removed, whether generally or, as we have proposed, in defined circumstances, the next question is whether defendants should receive the same treatment or should continue to be at risk for party and party costs. The choice, then, is between a so-called "no way rule", analogous to the "American rule" governing attorney fees, or a "one way rule". Under a no way rule, party and party costs cannot be awarded to a successful party simply by reason of the result in the action; costs, however, may be awarded in response to misconduct in the course of the litigation. Under a one way rule, while a plaintiff would be immune from having party and party costs awarded against him only by reason of being unsuccessful in the action, costs may be awarded against an unsuccessful defendant. Indeed, a one way scheme might be structured to *require* that costs be ordered against unsuccessful defendants.

From the perspective of the plaintiff, the one way costs rule is certainly more advantageous, particularly if the rule requires that costs be awarded to her

in the event of success.[79] A successful plaintiff, in addition to being generally immune from an adverse costs order, would be responsible for only that part of his solicitor and client costs not indemnified by an award of party and party costs against the defendant. By contrast, under a no way rule, a successful plaintiff would bear the full burden of his lawyer's costs, regardless of the outcome of the proceedings. Thus, for prospective plaintiffs, a considerable disincentive inheres in a no way rule.

In considering the choice between a no way rule and a one way rule, it is important to recall the two functions that the costs follow the event rule is said to serve. Earlier in this chapter, we stated that the most commonly cited purposes are indemnification of successful parties and discouragement of unmeritorious litigation.[80] In the Anglo-Canadian world, these two functions have been so generally accepted that they seem to be sacrosanct.[81] Proposing a change to the party and party costs rule thus places a burden on us to justify compromising these functions.

Turning first to the indemnification function, we suggest that it is useful to begin by asking what precisely is the purpose of indemnifying successful parties. Indemnification is said to "compensate" the successful party for the expense of vindicating his position. The notion of compensation, however, has been understood traditionally to refer to payments to recompense a party for the injury occasioned by the fault of another. Yet, under the two way rule, indemnification follows victory automatically, without regard to whether the unsuccessful party has been "wrong" in bringing or defending the action. Costs are routinely awarded against losing parties, even those who have been entirely reasonable in litigating and who have lost "a close case". Unless failure in the underlying action is itself regarded as a "wrong" for which compensation should be given, in addition to whatever remedy is ordered, it is difficult to ascribe a true compensatory purpose to the rule. Rather, it resembles "a species of strict liability":[82] indemnification follows inexorably from failure, not from attribution of fault.[83]

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[79] See Shavell, *supra*, note 43, at 60-61, and Rowe, *supra*, note 43, at 147, which assert that a one way rule would have the general effect of encouraging claims. However, it must be appreciated that, in their analysis of alternative fee shifting rules, both Shavell and Rowe assumed that the one way rule or the two way rule, as the case may be, provides for a 100% indemnification of the successful party's attorneys' fees. Accordingly, in each of their analyses, under a one way rule, a plaintiff who has a contingency fee agreement with his lawyer would bear no "downside risk" whatsoever. Neither Shavell nor Rowe considered a rule that would provide for partial indemnification, analagous to that in effect in Canada and England.

[80] *Supra*, this ch., sec. 2(a).

[81] But see Rowe, "The Legal Theory of Attorney Fee Shifting: A Critical Overview", [1982] Duke L.J. 651, and Gold, *supra*, note 4, at 52-60.

[82] Rowe, *supra*, note 81, at 656. See, also, *ibid.*, at 656 and 658.

[83] Rowe, *ibid.*, at 653-54, argued that our rule has been supported by circular reasoning:

> In the literature of the other developed nations of English legal heritage, it is surprising how rarely one finds any effort at theoretical justification for the indemnity

The second rationale for the rule is that it deters unmeritorious claims and specious defences, and thus acts as a filter for litigation. Few would dispute that the risk of an adverse costs award discourages frivolous claims and defences. Yet, in our view, the threat inherent in the rule is too broad in its effect, for undoubtedly meritorious claims and defences are embraced as well,[84] especially where a party is risk averse. To the extent that the rule deters litigation, regardless of substantive merit, it acts, in our view, as an inappropriate filter.

In its operation, then, the party and party costs rule is a blunt tool, which has an effect extending beyond the purposes that it is claimed to serve. While indemnification of successful parties does perform a true compensatory function in some cases, the virtual inevitability of the practice means that winning parties will receive indemnification even where their adversaries are not at fault. Similarly, when combined with other factors relating to the characteristics of the parties and their stake in the action, the inevitability of that result deters a wide field of proceedings, not just those so lacking in merit that they should not be initiated or brought to trial.

Seen in this light, the party and party costs rule, we suggest, should not be regarded as inviolate, despite its long acceptance as an integral feature of our system of civil justice. In making these observations, however, we must emphasize that we are not concerned about the party and party costs rule generally, but with the effect of its application on the type of litigation that is the main focus of this report, and with whether, and the extent to which, it is justifiable to depart from the rule in this context.

We have concluded that the no way costs rule is not an appropriate solution in this context.[85] We have already explained that a change is warranted where the plaintiff has no personal, pecuniary, or proprietary claim in the proceedings or, if she does, its value does not justify the litigation economically. For such a

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or 'two-way' fee shifting rule. To the extent that any main theme comes through at all, it is that awarding fees is not to punish a losing party but rather to provide indemnity for the winner. Such explanations as exist often go only that deep, not elaborating on why the loser should not feel punished or on what purpose 'indemnity' serves beyond speaking tautologically of reimbursing the winner for at least a portion of his legal fees. Such assertions seem to presume that the idea of indemnity should suffice by itself—that justice simply requires that losers pay winners' counsel fees. The near-universality of the practice may have insulated it from the kind of questioning that could produce deeper explanations; in any event, the American example shows that it is not self-evident to everyone that the loser should have to pay.

[84] Gold, *supra*, note 4, at 59.

[85] In the *Report on Class Actions*, the Commission rejected a one way rule in favour of a no way rule. In the case of class actions seeking monetary relief, a no way rule would be effective for, with the Commission's proposal for a modified form of contingent fee, the costs of the plaintiff would be paid out of any recovery, leaving him with no personal liability.

plaintiff, the no way costs rule offers only the appearance of equality.[86] In reality, regardless of the equal treatment of the parties, as in the case of the party and party costs rule, plaintiff and defendants will be unequally affected by whatever economic incentives are in effect. By definition, the plaintiff has little or nothing to gain personally from the proceedings, but must incur legal expenses to proceed. Whatever deterrence is thus entailed would be increased where the plaintiff also is risk averse. This would tend to be the case if the plaintiff were an individual of modest resources or a person who rarely, if ever, engaged in litigation—a so-called "one shotter".

By contrast, a defendant capable of inflicting a diffuse harm would tend to be a person for whom the costs of defending an action could not be so daunting. Such a defendant often would be a "repeat player", who would be risk neutral to litigation.

Due to the inherent inequality in the positions of plaintiff and defendant in the circumstances with which we are concerned, we have no doubt that a no way rule cannot operate in a balanced fashion. Support for our conclusion can be found in the American experience in the federal courts. As a practical matter, the American rule proved inadequate to the task of facilitating litigation to enforce certain federal statutes. Congress therefore has enacted numerous fee shifting provisions that allowed or required fees to be paid to successful plaintiffs.

Accordingly, it is our view that a form of one way rule should apply in the circumstances where we believe change is warranted. We favour a rule of the kind proposed by the Osler Task Force on Legal Aid.[87] Accordingly, we recommend that, as an exception to a court's jurisdiction to award costs under section 141 of the *Courts of Justice Act, 1984*, no costs should be awarded against a person who meets the proposed criteria unless he has engaged in vexatious, frivolous, or abusive conduct.[88] Enactment of this qualified immunity would not otherwise affect a court's jurisdiction with respect to costs under the *Courts of Justice Act, 1984*, and the relevant jurisprudence arising thereunder would otherwise prevail. Hence, where the plaintiff's action is successful, costs would almost invariably follow the event, as in ordinary civil actions.

While it may not be apparent, by proposing a costs immunity, except in the case of improper conduct, we have recommended what may be regarded as an

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[86] See Scott and Anand, "Financing Public Participation in Environmental Decision Making" (1982), 60 Can. Bar Rev. 81, at 114, where the same conclusion is drawn:

> In courtroom litigation, a system in which each party pays his own legal costs and disbursements is 'an empty choice for the public interest litigant'. Except in actions for substantial monetary relief, the sole effect of the American rule is to reduce the total potential cost liability while fixing the certain cost liability at a high and often unaffordable level.

[87] *Supra*, note 77, at 99.

[88] Draft Act, s. 5(1).

intermediate position. To redress the inherent imbalance between plaintiff and defendant, the Commission could have adopted a form of one way rule that would have required courts to award costs to successful plaintiffs. In addition, a one way rule might have specified that costs must be awarded on a solicitor and client basis. We have left the scale of costs to the court. We considered that, since indemnification on the higher solicitor and client scale generally has been awarded to successful parties only as a response to misconduct by their adversaries, mandatory full indemnification in the context of a one way rule would be unduly harsh and inequitable. As a consequence, even where the stipulated criteria are met, under our proposal the successful plaintiff will remain personally responsible for that part of her solicitor and client costs that is not indemnified by an award of party and party costs, subject to her arrangements with her lawyer.

Notwithstanding our belief that a one way rule is justifiable to redress the imbalance between plaintiff and defendant where the plaintiff has little or no personal economic interest in the proceedings, we are concerned that this rule not prejudice defendants unjustifiably. For this reason, we are of the view that the costs immunity should be further confined to circumstances where the defendant has a clearly superior capacity to bear the costs of the proceeding. This, then, is the fourth prerequisite that we recommend.[89] Where this criterion is met, a defendant will not be seriously affected by either an adverse costs award or the failure to recover party and party costs from a losing plaintiff. Where the defendant is no better able to afford the litigation than the plaintiff, a one way rule, we suggest, would be inequitable.

In determining whether the defendant has a superior capacity to pay litigation costs, we expect that the court would ascertain if, and to what extent, the defendant can absorb the costs or pass them on to others. Where the government is the defendant, costs would be passed on through the vehicle of taxation, and would thus fall on the general taxpaying population. In the case of large corporations, the burden will either be shifted to the consumers or result in diminished profits.

With the introduction of a one way rule, the indemnification function performed by the existing party and party costs rule will, of course, be partially lost. Indeed, this is the essence of the one way rule that we have proposed as a solution to the access problem in the context.

With respect to the function of filtering out specious claims, we have no doubt that this is very important to the administration of justice. We suggest that this objective will be met by the prerequisite that the issues have an importance extending beyond the interests of the parties involved. Such issues would not be frivolous or specious, even though the proceedings might ultimately be

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[89] *Ibid.*, s. 5(1)(d).

unsuccessful.[90] Furthermore, it should be noted that the danger of frivolous or vexatious actions is addressed by the Rules of Civil Procedure.[91]

We realize that it might be argued that reliance on these existing mechanisms and on the requirement that issues be important addresses claims only at one end of the spectrum. The party and party costs rule would discourage not only these claims, but in addition, *bona fide* claims that are not frivolous and vexatious, but ultimately unmeritorious. Since these "better" unmeritorious claims would no longer be discouraged, defendants would have to bear the costs of defending them, a cost that, by definition, could not be shifted in the absence of misconduct.

To this argument, we offer a simple answer: any loss of deterrence, resulting in the litigation of *bona fide*, although ultimately unmeritorious claims, is the justifiable price for allowing the adjudication of meritorious claims that otherwise would be barred.

Before turning to solicitor and client costs, there are two further matters that we wish to address. The first concerns the possibility of awarding costs in favour of an unsuccessful plaintiff. We are aware of certain proposals in favour of a "mandatory" one way rule, which would require that costs be awarded to a plaintiff, regardless of the outcome of the action,[92] thus removing the remaining financial disincentive to potential plaintiffs. Such a rule has been supported by a deterrence rationale, on the premise that it "could promote greater care by potential defendants when engaging in conduct which may offend public rights".[93] Furthermore, it has been suggested that this rule is easier to justify where the defendant is government, and the constitutionality or legality of its actions are in issue.[94]

We have rejected a rule requiring that costs be awarded to plaintiffs as entirely inappropriate. We consider that a one way rule of the nature that we have proposed to be a substantial, and sufficient, departure from the present law, and the proper balance to be struck, in this context.

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[90] Osler Task Force on Legal Aid, *supra*, note 77, at 99.

[91] O. Reg. 560/84. Under r. 21.01(b), a defendant may move to strike out a pleading on the ground that it discloses no reasonable cause of action. Under r. 25.11, the court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading is scandalous, frivolous or vexatious, or is an abuse of the process of the court. Under r. 57.07(c), costs may be awarded against a lawyer personally who "has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default".

[92] See the proposal of the Canadian Environmental Law Research Foundation, quoted *supra*, note 76. See, also, Wilson, "Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and An Application to the Shareholders' Derivative Action" (1985), 5 Windsor Yearb. Access Justice 142, at 161 and 167-68.

[93] Wilson, *ibid.*, at 161.

[94] *Ibid.*, at 167.

In rejecting this alternative, we do not wish to be taken to oppose the possibility that costs might be awarded in favour of an unsuccessful plaintiff. Rule 57.01(2) of the Rules of Civil Procedure provides that "[t]he fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case". In the past, costs generally were awarded against successful parties only where there has been some misconduct on their part. Since this is a new rule, it seems reasonable to conclude that the reference to "a proper case" does not codify the earlier case law.[95] At present, there is no reason to expect that courts would interpret the rule in a restrictive manner, and consequently it is unnecessary for us to make a specific proposal that the courts should expressly be given this discretion in this context.

Finally, we wish to address the timing of the determination whether a plaintiff is to be immune from an award of party and party costs. If the question is decided at the end of the proceedings, as in ordinary actions, the plaintiff would be left with an uncertainty similar to that inherent in the existing party and party costs rule. While it might be somewhat easier to anticipate whether the proposed criteria for immunity would be met than to predict success on the merits, prospective plaintiffs nevertheless would be unsure whether they would have to pay the defendant's party and party costs, in addition to their own solicitor and client costs, should they lose. For plaintiffs having little or no personal financial interest in the proceedings, the possibility that a court ultimately might find that the requisite criteria have not been satisfied would, in many cases, be sufficient a disincentive to discourage them from proceeding. Without providing an assurance of a general immunity, subject, of course, to costs being awarded in the event of misconduct, the purpose of our basic costs proposal would likely be frustrated.

We believe that the solution to this difficulty is simply to allow a motion to be made at any time in the proceeding for a declaratory order determining whether the plaintiff has an immunity from party and party costs, and we so recommend.[96]

We would expect that a plaintiff would apply as early as possible in the proceedings for an order that the prescribed criteria are met. Not only would this settle at the outset the question of potential party and party costs liability, but a favourable decision would be necessary to benefit from the proposals that

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[95] For examples of earlier case law, see *Hartford v. Langdon Coach Lines Co. Ltd.* (1975), 10 O.R. (2d) 617, 64 D.L.R. (3d) 213 (H.C.J.), and *Wismer v. Javelin International Ltd.* (1982), 38 O.R. (2d) 36, 136 D.L.R. 647 (H.C.J.). But see *Welk v. Saskatchewan Social Services Appeal Bd.* (1986), 28 D.L.R. (4th) 475, [1986] 5 W.W.R. 478 (Sask. C.A.), leave to appeal to S.C.C. denied (1986), 28 D.L.R. (4th) 475*n*, where a government minister was ordered to pay the costs of an unsuccessful respondent, which were fixed by the court at $500. The court considered such an order appropriate since the case was "of first instance involving an uncertain point of public interest law" and bearing in mind the respondent's "circumstances", that is, that he was unable to work due to an injury.

[96] See Draft Act, s. 5(3). For a similar proposal, see Scott and Anand, *supra*, note 86, at 114-15.

we shall make respecting solicitor and client costs, security for costs, and offers to settle. A defendant may also wish to apply for an order deciding the applicability of the costs immunity so that the costs situation would be clarified.

If the factual basis of the application is too unsettled to allow the court to decide the motion, the determination could be postponed until later in the proceedings. Requesting the court to make a declaration need not entail an additional, and possibly disruptive, step in the proceedings. Where a defendant brings a motion to challenge a plaintiff's standing, on the hearing of that motion, the plaintiff could request the declaratory order.

### (c) Solicitor and Client Costs

In the previous section, we dealt with the potential liability of a plaintiff for the party and party costs of the defendant, should the action be unsuccessful. Even where a plaintiff will enjoy a costs immunity under our recommendations, she still faces the problem of paying solicitor and client costs, that is, the fees and disbursements owed to her own lawyer. Where the action is successful, a plaintiff ordinarily will recover costs on a party and party scale, leaving her personally responsible for the difference between the lawyer's bill and this amount. Where the action is unsuccessful, while she generally will not be required to pay the party and party costs of her adversary, the plaintiff will be obliged to pay the entire bill of her own lawyer. To the extent that governmental or other funding is available, the burden of solicitor and client costs would be alleviated, in whole or in part. Given the plaintiff's lack of a personal financial interest in the proceedings, any liability that she must bear will constitute a substantial disincentive to litigation, regardless of the immunity from party and party costs.

In earlier sections of this chapter, we canvassed possible solutions to this difficulty. In our discussion of the present Ontario law,[97] we cautioned that strong reliance should not be placed on the ability of a plaintiff to solicit voluntary contributions that would cover the full extent of his financial liability. Due to the "free rider" effect, it was virtually certain that insufficient amounts would be ultimately be realized. Yet it is possible that, while the entire amount of his lawyer's bill might be too large to collect, the difference between that bill and party and party costs—depending on the circumstances, a considerably smaller amount—might be gathered.

In an earlier discussion, we also expressed our reservations about relying on a scheme of government assistance as the primary means of dealing with the costs barriers facing prospective plaintiffs.

The matter that, we believe, is critical and therefore that should be addressed, concerns the plaintiff's liability for solicitor and client costs where

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[97] *Supra*, this ch., sec. 2(d).

his action is unsuccessful. We propose that, in circumstances where a person[98] would enjoy an immunity from party and party costs, she and her lawyer should be able to make an agreement that the lawyer would be paid only if the action is successful.[99] For reasons that we shall explain shortly, we recommend that the parties to this agreement should not be able to specify an amount payable to the lawyer as a gross sum, or as a percentage or commission.[100] Finally, like any other agreement relating to "business . . . to be done in court", it would have to be approved by an assessment officer to be effective.[101]

Permitting such an arrangement would be a departure from present Ontario law. However, in view of the recent recommendation of the Law Society of Upper Canada to allow contingency fees, we consider that the need for us to make the case for change has diminished considerably. We do not propose to examine the common law origins of the statutory rejection of contingency fees or the history of the prohibition in Ontario. Both of these matters were discussed in some detail in our *Report on Class Actions*.[102] We shall, however, canvass the four main policy arguments that have been raised against contingent fees. While these arguments are discussed at length in that report,[103] given the longstanding opposition in Ontario—particularly as compared to the other provinces and territories—it is important to respond to each of them.

In essence, underlying each of the arguments against contingent fees is an assumption that, because the lawyer acquires a personal financial interest in the proceedings, she may engage in a certain type of misconduct.

First, it has been contended that the prospect of contingent fees will cause lawyers to "stir up" litigation by persuading individuals to initiate unmeritorious actions. However, it can be argued that contingent fees may have precisely the opposite result, for an unsuccessful action will result in no compensation for the lawyer. In theory, therefore, specious actions should be filtered out before, or soon after, they have been instituted, for lawyers have an economic interest in rejecting them. The risk of having party and party costs awarded against them also operates as a disincentive to plaintiffs bringing a frivolous action. Under our costs proposals, this counterweight will remain, for a plaintiff bringing a specious proceeding will not enjoy a costs immunity; the proceeding will not involve issues the importance of which extends beyond the interets of the parties involved.

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98 *Supra*, this ch., sec. 4(a).

99 Draft Act, s. 6(1). Such an agreement, like the contingency agreements allowed in the other provinces and territories, would have no effect whatsoever on the party and party costs payable by an unsuccessful defendant.

100 Draft Act, s. 6(2).

101 *Solicitors Act*, *supra*, note 17, s. 19. See *Re Greenspan, Rosenberg and Buxbaum* (1987), 17 C.P.C. (2d) 213 (Ont. H.C.J.).

102 *Report on Class Actions*, *supra*, note 7, at 716-22.

103 *Ibid.*, at 725-31.

The second argument against contingent fees is that a lawyer's interest in the outcome of the action may lead him to engage in whatever tactics are thought necessary to achieve success. Thus "sharp" or unethical litigation practices will be encouraged.[104]

While we certainly recognize that a contingent fee arrangement put economic pressure on a lawyer that is more intense than where compensation will be received in any event, we do not regard this argument as persuasive. This conduct is clearly not a necessary by-product of such arrangements; and it hardly needs noting that allegations of misconduct have been made against Ontario lawyers who act for clients on a non-contingent basis. Such behaviour is liable to censure from the Bench and risks the disapproval of The Law Society of Upper Canada. In some cases, an offending lawyer may be ordered by the court to pay costs personally and may be disallowed costs from his own client.[105] The range of existing disciplinary measures, we suggest, can respond equally to any instances of improper conduct by lawyers acting on a contingent basis.

The third argument is that contingency fees encourage solicitation of clients, which is regarded as an unfair means of competition.[106] We doubt, however, whether it can be shown that these arrangements have this effect. Indeed, it can be argued that there is an incentive to solicit clients where payment is certain, as it is under the present Ontario law, because the lawyer knows that she will be paid regardless of the outcome. Even if this abuse were to occur, it, like the others, can be dealt with by The Law Society of Upper Canada.

The fourth criticism of contingency fees relates to the possibility of a conflict of interest between lawyer and client. We discussed this abuse in the *Report on Class Actions* as follows:[107]

> Where lawyer and client are allowed to set the terms of a fee agreement, the lawyer's natural desire to negotiate an agreement for the maximum fee possible is in conflict with the interest of the client in obtaining the largest possible net recovery. Once the agreement is concluded and the action proceeds, the interests of client and lawyer become congruent, as the maximum recovery is the goal of each. Where the possibility of settlement is raised, however, the conflict of interest reappears in an accentuated form. In theory, any advice that a lawyer gives a client about a proposed settlement should be motivated solely by a concern for the best interests of the client . . . . [A] decision to settle inevitably will affect the remuneration of the lawyer, because it can transform a possibility of reward into a

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104 In the *Report on Class Actions*, *ibid.*, at 727, we noted that the following types of misconduct usually are cited: " 'building a case' by construction of evidence; improper coaching of witnesses; use of demonstrative evidence designed only to elicit the emotions and sympathies of the jury; improper examination and cross-examination; and inflammation of damages".

105 Rules of Civil Procedure, *supra*, note 4, r. 57.07(1).

106 In the *Report on Class Actions*, *supra*, note 7, at 729, we observed that "solicitation does not comport with the notion of detachment believed to be inherent in professionalism".

107 *Ibid.*, at 729.

certainty. As a result, the lawyer's advice may be influenced by his understandable interest in maximizing his return on his investment of time and effort.

> Of all the criticisms levelled at contingent fee agreements, this is the most cogent, and it has caused us the greatest concern. That there is an inherent conflict of interest where a decision in an action affects whether a lawyer is to receive remuneration, or its amount, simply cannot be denied. Moreover, where the fee is contingent and is to be determined by the application of a percentage formula, this conflict is particularly acute, as the independence of the amount of the fee from the hours worked gives a lawyer an incentive to structure the timing of the settlement in a manner that will produce the best return to him.

In the *Report on Class Actions*, we addressed the danger of a conflict of interest by recommending that the contingent fee agreement should not be permitted to specify either the amount of the fee or the method by which it is to be calculated. Calculation of the fee was left entirely to the court. When presented with a settlement offer, the class lawyer would thus be unable to respond with foreknowledge of the amount of his fee. In our view, this would reduce the conflict of interest considerably.[108] Furthermore, we believed that the recommendation that all settlements of class actions receive prior court approval would prevent the conflict of interest from operating to the detriment of the class members, since the court would assure that the settlement is in their best interests.[109]

We do acknowledge, once again, that where a plaintiff and her lawyer enter into a contingent fee agreement of the kind that we have proposed, the possibility of settlement raises a conflict of interest, for what has hitherto been a contingent fee may be made certain. We suggest, however, that the effect of the conflict of interest would be attenuated by a combination of factors. We have already recommended that the agreement should not be able to specify a fee as a gross sum, percentage, or commission; the parties might, however, settle on the method of calculation of the fee which, in the language of the *Solicitors Act*, would be "by salary or otherwise". By prohibiting the agreement from establishing a gross, percentage, or commission fee, the conflict of interest problem, to a great extent, would be addressed, for a lawyer could not recommend settlement with absolute certainty about the amount of his fee.

Like any other agreements respecting proceedings in court, to be effective under the *Solicitors Act* it would have to be approved by an assessment officer; without such approval a lawyer is not entitled to receive payment.[110] Similarly, like any other agreement it would be subject to review by the court at the behest of either party: "every question respecting the validity or effect of it may be examined and determined, and [the agreement] may be enforced or set aside . . . on the application of any person who is a party to the agreement".[111] The

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[108] *Ibid.*, at 730-31.

[109] *Ibid.*

[110] *Solicitors Act*, *supra*, note 17, s. 19.

[111] *Ibid.*, s. 25.

court may enforce it "if it appears . . . that the agreement is in all respects fair and reasonable between the parties".[112] Where the agreement is set aside, the lawyer's compensation is subject to assessment by an assessment officer.[113]

There are other reasons why we have a diminished concern about conflicts of interest. First, the plaintiff in this context can be expected to exert much more influence over the lawyer concerning settlement negotiations than a plaintiff in class action litigation. The inducement to do so, of course, will not be an economic interest, since a plaintiff enjoying a costs immunity will have little or no pecuniary or proprietary interest in the proceedings. Rather, the plaintiff's motivation to monitor settlement negotiations will be found in the very reasons that inspired the initial decision to bring the action: the desire to question an important policy or action.

Second, since the termination of these actions will not be *res judicata* in relation to any person other than the parties, it will be in the interest of the defendant to conclude a reasonable and fair settlement because a failure to do so may lead to another lawsuit by another plaintiff having standing to initiate the litigation. This interest will act as a counterbalance to the financial interest of the lawyer under a contingency fee arrangement in securing a settlement in order to ensure her fee, regardless of the wishes and interests of her client. If, for example, it were reasonably likely that the plaintiff would be granted an injunction, and the defendant settled the action by simply paying the plaintiff's solicitor and client costs, another individual with an interest like that of the plaintiff might start an action seeking an injunction, or apply to intervene and take over the action that the plaintiff is prepared to settle or discontinue. Furthermore, where proceedings have been settled, a second plaintiff would, with few exceptions, be able to avail herself of the costs immunity, since the earlier action would not have been decided on the merits.

One important matter remains to be addressed. Unless the amount payable under the agreement were to take account of the financial risk assumed by the lawyer in agreeing to payment only in the event of success, it would not be economically rational for a lawyer to act on this basis. Compensation for the risk that the expenditure of time and effort will go unrewarded has been recognized as essential for a "fair and reasonable" contingency agreement in British Columbia.[114] In Ontario, risk is not a factor on a solicitor and client assessment.[115] It would therefore appear necessary expressly to allow an agreement

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112 *Ibid.*, s. 26.

113 *Ibid.*

114 See, for example, *Monteith v. Calladine* (1964), 47 D.L.R. (2d) 332, 49 W.W.R. 641 (B.C.C.A.); *Deans v. Armstrong* (1983), 46 B.C.L.R. 273, 149 D.L.R. (3d) 295 (S.C.); and *Usipuik v. Jensen, Mitchell & Co.* (1986), 3 B.C.L.R. (2d) 283, [1986] 5 W.W.R. 41 (S.C.).

115 Risk is irrelevant because the lawyer cannot act on a contingent basis. See *Re Solicitors*, *supra*, note 19, where Taxing Officer McBride set out the factors.

to provide that the risk of non-payment assumed by the lawyer should be rewarded. As with any other provision, should the client later challenge the agreement, for it to be enforceable, it would have to meet the general standard in the *Solicitors Act* that it is "fair and reasonable between the parties".

We therefore recommend that, where a person enjoys a costs immunity, a person and her lawyer should be able to enter into an agreement in writing that provides that the lawyer is entitled to be paid fees, costs, disbursements or charges, only in the event of success in the proceeding.[116] Following from our concern about conflict of interest, we recommend that such an agreement should not be permitted to specify the amount of the lawyer's payment as a gross sum or that payment is to be a commission or a percentage.[117] Finally, we recommend that an agreement may provide an amount payable in respect of fees as reasonable compensation for the risk of non-payment assumed by the lawyer.[118]

We acknowledge that this is a modest set of proposals, which may well make contingent fees arrangements unattractive to some potential litigants. Essentially, our proposals give explicit legal recognition to what are now, by necessity, purely informal agreements by lawyers to waive their fees if the action is unsuccessful. We have addressed solicitor and client costs only in unsuccessful actions; the problem of the successful plaintiff being personally responsible for the difference between solicitor and client costs and the party and party costs remains. Moreover, in a successful action, the discrepancy between the amount of solicitor and client costs and the amount of party and party costs will be increased by the incremental amount payable by the client to compensate the lawyer for the risk of non-payment. For some prospective plaintiffs, the prospect of paying a greater amount in the event of success may outweigh the certainty of avoiding payment altogether in cases of failure.

While recognizing the force of these criticisms, the Commission is firmly of the view that no other solution is acceptable or feasible.

We believe that contingent agreements will, in fact, appeal to plaintiffs and their lawyers in many circumstances. Our recommendations simply acknowledge that this is an alternative arrangement that should be available to them.

Should the *Solicitors Act* be amended to permit contingency fees, as proposed by The Law Society of Upper Canada, we envisage that a plaintiff would have the choice of making a contingency arrangement under that scheme or, if she meets the prerequisites for a costs immunity, proceeding under the Commission's recommendations.

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116 Draft Act, s. 6(1).

117 *Ibid.*, s. 6(2).

118 *Ibid.*

### (d) Ancillary Matters

#### (i) Security for Costs

Rule 56 of the Rules of Civil Procedure allows the court, in certain circumstances, to make such order for security for costs as is just. The main purpose of ordering security is to ensure that a successful defendant will be able to recover party and party costs in circumstances where otherwise it appears that costs might be difficult to recover. A second purpose of the rule, it has been said, is to put an end to the proceedings.[119]

Both of these purposes, we suggest, are inconsistent with the policy underlying the costs immunity that we have proposed for a plaintiff who can show that the four recommended prerequisites have been met. The very notion of security for costs assumes that a plaintiff is at risk for the party and party costs of her adversary. For a plaintiff who will enjoy a costs immunity, the concept ceases to have any meaning, as there no longer remains costs for which security might be given.[120] With respect to the discouragement of litigation by means of orders for security for costs, we regard this objective as entirely at odds with the fundamental purpose of our costs proposals, which is to avoid this effect.

We are of the view that there should be no uncertainty about the inapplicability of Rule 56 to plaintiffs who are to enjoy a costs immunity. Accordingly, we recommend that an order for security for costs should not be made against a person against whom costs cannot be awarded.[121]

#### (ii) Offers to Settle

Rule 49 establishes an offer to settle procedure that is available to both plaintiffs and defendants.[122] For our purposes, the costs consequences of a failure to accept an offer to settle are crucial.

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119 Watson and McGowan, *Ontario Supreme and District Court Practice 1987* (1987), at xxxiv.

120 Rule 56.01(e) allows for security for costs where it appears that "there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent". We have recommended that a plaintiff who otherwise enjoys a costs immunity should be liable for costs in the event of vexatious, frivolous, or abusive *conduct*. This exception focuses on the plaintiff's conduct in the litigation, not on whether his claim is "frivolous and vexatious", as does r. 56.01(e). A plaintiff will have a costs immunity if the importance of the issues raised extends beyond the immediate interests of the parties involved. A person who meets this standard could not be bringing a frivolous and vexatious action or application within the meaning of the r. 56.01(e).

121 Draft Act, s. 5(4).

122 Under s. 141 of the *Courts of Justice Act, 1984*, *supra*, note 4, the jurisdiction of the court to award costs is expressly made subject to statute and the Rules of Civil Procedure. Rule 57.01(1), which lists the factors to be considered in exercising its discretion, gives special prominence to "the result in the proceeding and any offer to settle made in writing". This reference directs the court's attention specifically to R. 49.

Rule 49.10(1) provides that, where the plaintiff makes an offer, and later obtains a judgment as favourable as, or more favourable than, the terms of the offer, the plaintiff is entitled to party and party costs to the date of the offer and solicitor and client costs thereafter, unless the court orders otherwise. Rule 49.10(2) provides that where the defendant makes an offer and the plaintiff obtains judgment, if the judgment is as favourable as, or less favourable than, the terms of the offer to settle, the plaintiff is entitled to party and party costs to the date of the offer, and the defendant is entitled to party and party costs thereafter, unless the court orders otherwise. While, as indicated, the court has been given a residual discretion to make an order that the specified costs consequences should not follow, the Ontario Court of Appeal has taken the position that it should rarely be invoked.[123]

Where the requirements of rule 49.10 have not been met, the court, in exercising its discretion with respect to costs, nonetheless may consider any offer to settle made in writing, the date the offer was made, and its terms.[124]

The purpose of Rule 49 is to facilitate settlements.[125] While undoubtedly this is a salutary policy, we question whether the means of furthering it through the imposition of costs sanctions is appropriate, in view of the nature of the litigation of primary concern to us in this report, particularly since the plaintiff will not be seeking to vindicate a personal, proprietary, or pecuniary interest.

A plaintiff without any pecuniary interest in the proceedings, or whose interest is outweighed by the expense of litigation, undoubtedly would be obliged to accede to an offer that will put her at risk for costs after the date it is made. Indeed, should rule 49.10(2) apply, its practical effect would be to remove the costs immunity from that date. Given the nature of the plaintiff's interest, there would be an incentive for the defendant to make an offer as early as possible, thereby increasing the magnitude of the financial risk placed upon the plaintiff. That our proposal for a general costs immunity, which we regard as crucial to the efficacy of our standing reforms, might be so easily frustrated is of great concern to us.

Furthermore, in the circumstances, one might well question the need to provide the plaintiff with an incentive to settle through the offer to settle procedure. A successful plaintiff who enjoys a costs immunity ordinarily will recover costs on a party and party scale. The fact that she will be responsible to pay whatever part of the solicitor and client costs remains is itself an inherent inducement to settle.[126]

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123 In *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. Laflamme Ltd.* (1987), 58 O.R. (2d) 773, at 777, 19 C.P.C. (2d) 163.

124 Rules of Civil Procedure, *supra*, note 4, r. 49.13.

125 *Niagara Structural Steel (St. Catharines) Ltd. v. W.D. Laflamme Ltd.*, *supra*, note 123, at 777.

126 By contrast, under the Commission's costs proposals for class actions, in a class action for monetary relief, where a contingent fee agreement is concluded, a plaintiff will face no

Finally, we suggest that the policy in favour of settlement of disputes may not necessarily be as strong in the context of the proceedings that are intended to be facilitated by our standing reforms as it is generally in other kinds of civil litigation. Where, for example, a person challenges the constitutionality or legality of government action or policy before the courts, or seeks an injunction to enjoin activity causing widespread harm, the issues are of a somewhat different order than the issues addressed in proceedings that do not implicate interests other than those of the immediate parties. By definition, where a costs immunity is available, judicial resolution of the issues will have an importance extending beyond its impact on such parties. Thus, as a matter of principle, there is a countervailing public interest in favour of achieving a judicial determination of the questions raised by the proceedings.[127] In a sense, a recognition of that public interest is at the root of both our proposals to reform the law of standing and the costs recommendations we have made in furtherance of them.

Notwithstanding our reservations about the applicability of a policy favouring settlement in this context, we are loath to abandon it entirely. We are of the view that the proper approach is to find a balance between the competing factors. In furtherance of this goal, we recommend that, where a plaintiff who is not otherwise liable for party and party costs is successful and the judgment is not more favourable than the terms of an offer to settle made and served by an opposing party, the plaintiff is entitled to party and party costs to the date that the offer to settle was served, but the court may award him party and party costs after that date.[128]

While this modification would reduce the deterrent effect of an offer to settle, there would be an incentive for the plaintiff to settle for fear of losing his entitlement to party and party costs to the date of judgment; given the plaintiff's interest, that incentive would be powerful indeed.

We have given the court a residual discretion to order that the plaintiff may recover costs from the date the offer was served, even where the plaintiff fails to obtain a judgment more favourable than the terms of an offer. We have rejected giving the court authority simply to "order otherwise", for such broad language might be interpreted to allow a court to deny a plaintiff party and party costs until that date if a better result has not been achieved. Such an exercise of discretion, simply for the reason that a plaintiff has not achieved a more favourable judgment, would be entirely inconsistent with the tenor of our costs proposals, and would disregard the important contextual factors that would have persuaded a court to determine that the plaintiff should have a costs immunity.[129]

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costs burden personally, regardless of the result: see *Report on Class Actions*, *supra*, note 7, at 704-31.

127 See, generally, Fiss, "Against Settlement" (1984), 93 Yale L.J. 1073.

128 Draft Act, s. 5(5).

129 Under our costs proposals, a court would undoubtedly be able to make an order of "no costs" in proceedings where a plaintiff has been successful. The court's jurisdiction under

We make no recommendation with respect to rule 49.13, which allows the court, in the exercise of its discretion with respect to costs, to consider the date and terms of an offer to settle where there has not been compliance with rule 49.10. While the ambit of that discretion remains to be delineated,[130] the language of the rule is sufficiently general that a court would be capable of considering an offer to settle in the light of the particular circumstances of the litigation. Consequently, we do not anticipate that rule 49.13 would be interpreted to authorize a court to deprive a successful plaintiff of party and party costs in these circumstances, only by reason of her refusal to accept a better offer.[131] Should events prove us wrong in this expectation, the rule should be amended to avoid such an order in this context.

### (iii) Interlocutory Proceedings

In considering the matter of motions,[132] we have formed the view that a motion to challenge the standing of a plaintiff involves considerations very different from those applicable to motions generally.

#### *a. General*

At present, a court may choose among various costs orders on a motion. Costs may be payable to a party "in any event of the cause", in which case the party will be entitled to costs, regardless of the outcome of the merits of the case and the ultimate disposition of costs. However, unless these costs are ordered to be paid forthwith, a party cannot recover them until the proceedings are ended. Alternatively, costs may be awarded "in the cause", in which case the party who ultimately receives party and party costs—usually this will be the party who succeeds on the merits—will be entitled to the costs of the motion.

These general principles have been modified by certain Rules of Civil Procedure that deal specifically with the costs of motions. Of these, rule 57.03(1), which concerns contested motions generally, is perhaps the most significant. It was introduced for the purpose of discouraging unnecessary motions. It provides that, where the court is satisfied that the motion ought not to have been

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s. 141 of the *Courts of Justice Act, 1984* has only been reduced in the ability to order costs against a plaintiff who has been found to deserve an immunity; its authority to order costs is otherwise unimpaired.

130 "Annotation" (1986), 7 C.P.C. (2d) 159-60.

131 However, in *Datamex Ltd. v. Eberline International Corporation* (1986), 7 C.P.C. (2d) 159 (Ont. H.C.J.), the defendant withdrew an offer shortly before trial that was better than the judgment obtained by the plaintiff. Under r. 49.13, the court ordered no costs to either party, as the offer was "more than reasonable" (at 162).

132 Rule 1.03.17, *supra*, note 4, defines motion as "a motion in a proceeding or an intended proceeding".

made or opposed, the court must fix the costs of the motion and order them to be paid forthwith, or order the costs of the motion to be paid forthwith after assessment.[133]

While we have recommended a general costs immunity when the prescribed criteria are met, we do not believe that the immunity should extend to a plaintiff who has brought or whose conduct has caused an unnecessary motion. A plaintiff, for example, whose unreasonable refusal to produce documents obliges a defendant to bring a motion to compel production should be subject to an award of costs.

In our view, the way to approach this matter is simply to provide that the proposed costs immunity does not extend to motions, and we so recommend. This would leave intact the principles applicable to motions generally.[134]

### *b. Motion to Challenge Standing*

In chapter 3,[135] we explained that there is a danger that the present Rules of Civil Procedure might be abused by defendants. Challenges to standing might be made for the ulterior purposes of delaying the proceedings or increasing litigation expenses for the plaintiff, rather than for the legitimate purpose of quickly determining that a plaintiff does not have standing to proceed.

Despite our proposals for party and party costs and solicitor and client costs, the entire financial risk will not necessarily be removed from plaintiffs, even where the party and party costs immunity is applicable. Should a defendant successfully challenge the plaintiff's standing, no costs immunity, of course, will be available, and the disposition of the costs of the standing motion will be subject to the principles governing ordinary motions. Costs may be awarded against a plaintiff.

To address our concern that plaintiffs not be subject to challenges by defendants made for improper purposes, we drew on the costs rule that is applicable to motions for summary judgment,[136] which is designed to discourage improper recourse to that procedure. We recommend that, where a person is

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133 Where a party fails to pay these costs, the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just: Rules of Civil Procedure, *supra*, note 4, r. 57.03(2).

134 Draft Act, s. 5(2). Given the nature of the proposed costs regime, an order that "costs are in the cause" will have a very different meaning for a defendant in this context. Where the plaintiff is granted a costs immunity, and the defendant is successful on the motion and ultimately on the merits, in the absence of misconduct on the part of the plaintiff, it will be tantamount to an order of "no costs" on the motion.

135 *Supra*, ch. 3, sec. 4.

136 Rules of Civil Procedure, *supra*, note 4, r. 20.06(1).

successful in resisting a challenge to his right to commence and maintain a proceeding, costs in respect of that challenge should be awarded on a solicitor and client scale, payable forthwith, unless the court is satisfied that the challenge although unsuccessful, was nevertheless reasonable.[137]

## 5. INTERVENTION

In the previous chapter, we took the view that the language of Rule 13 of the Rules of Civil Procedure was sufficient to allow courts to exercise their discretion with respect to intervention in a manner consistent with the new regime that we have proposed to govern standing. Where a plaintiff has initiated proceedings raising significant public issues or implicating a broad array of interests, it is important that the court be willing to consider whether submissions from persons other than the immediate parties should be permitted.

As with the decision to commence proceedings, the resolve of an individual to intervene may be affected by costs. Should the potential expense of intervention be a deterrent, the liberal right of intervention that we endorsed in the previous chapter will be ineffectual.

Rule 13.01, dealing with party interventions, does not mention costs at all; it states only that, if intervention is permitted, the court "may make such order as is just". However, as a party intervenor, a person presumably would be governed by the costs principles that apply to parties generally. A party intervenor therefore could receive or be ordered to pay an award of party and party costs.

Where a person intervenes under rule 13.02 as a friend of a court, it would appear doubtful that she would be neither entitled to, nor liable for costs since she is not a party to the proceedings. The general rule is that only parties may receive or be ordered to pay costs.[138]

This matter has received little attention in the cases on intervention. There is a decision under former rule 504a,[139] where intervention was allowed on an appeal on the condition that the intervenor would not be able to seek costs, but might be subject to them, depending on the result.[140] In a case under rule 13.01, the court allowed a person to intervene as a party respondent on an appeal, but

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137 Draft Act, s. 7.

138 Scriven and Muldoon, "Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedure" (1985), 6 Advocates' Q. 448, at 471-72. See, also, *Rockwell Developments Ltd. v. Newtonbrook Plaza*, [1972] 3 O.R. 199, 27 D.L.R. (3d) 651 (C.A.), dealing with the court's jurisdiction to award costs against non-parties.

139 R.R.O. 1980, Reg. 540.

140 *Wotherspoon v. Canadian Pacific* (1981), 35 O.R. (2d) 449, 20 C.P.C. 72 (C.A.). See, also, *Re Schofield and Ministry of Consumer and Commercial Relations* (1980), 28 O.R (2d) 764, 19 C.P.C. 243 (C.A.) (*per* Zuber J.A. dissenting).

required it to pay an amount as security for the costs of the original respondent.[141] Finally, in a recent appeal, the Ontario Court of Appeal ordered the unsuccessful party to pay the costs of three intervenors.[142]

Notwithstanding that little, if any, guidance can be divined from the scant case law, we are of the view that specific recommendations are warranted to ensure that intervention is not discouraged through anxiety about potential liability for party and party costs. The approach that we have taken to costs generally should be applied to intervenors, with appropriate modification of the criteria for costs immunity. Accordingly, we recommend that, except where the intervenor has engaged in vexatious, frivolous, or abusive conduct, costs should not be awarded against an intervenor in the following circumstances:

(a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties;

(b) the intervenor has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or if he has such an interest, it clearly does not justify the intervention economically; and

(c) the intervenor has contributed significantly to the resolution of the issues.[143]

As with our costs proposals generally, we have not expressly addressed the award of costs to intervenors. Subject to the proposal that follows, this would continue to remain in the discretion of the courts.

The final matter that we wish to address respecting intervention costs relates to the liability of other parties to pay the costs of intervenors. As we indicated, an unsuccessful party may be required to pay costs to intervenors. We are of the view that a person who enjoys the immunity from party and party costs that we recommended earlier in this chapter should not be subject to such an obligation. Otherwise, there will be a financial threat to the plaintiff whenever a person is allowed to intervene, which may be sufficient to deter the proceedings entirely. Accordingly, we recommend that an intervenor should not be entitled to recover costs from a person against whom party and party costs cannot be ordered.[144]

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141 *Halton Community Credit Union Ltd. v. ICL Computers Canada Ltd.* (1985), 47 C.P.C. 162 (Ont. C.A.).

142 *Lavigne v. Ontario Public Service Employees Union*, *supra*, note 15.

143 Draft Act, *supra*, note 69, s. 8(1).

144 *Ibid.*, s. 8(2).

# SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

## THE LAW OF STANDING: PROPOSALS FOR REFORM (CHAPTER 4)

1. (1) Subject to the right to commence and maintain a proceeding that is conferred by or under any legislation other than the Act proposed by the Commission in this report (see Recommendation 6), the present provincial law of standing should be abolished, to be superseded by a new *Access to Courts Act*.

   (2) The new *Access to Courts Act* should contain a section expressly articulating the principle that the Act is to be read expansively and liberally, so as to increase access to the courts by granting the right to commence and maintain a proceeding to many persons who now would not have that right.

   (3) The Act should establish a single, more liberal rule respecting the commencement and maintenance of proceedings. In particular, every person should be entitled to commence and maintain a proceeding unless a party challenging such a right satisfies the court that there exist factors against proceeding that outweigh the factors in favour of proceeding. (See, also, Recommendation 4.)

   (4) The proposed rule respecting the commencement and maintenance of proceedings should be applicable to all types of civil proceeding, including proceedings under the *Judicial Review Procedure Act*.

2. The proposed *Access to Courts Act* should provide that no proceeding shall be dismissed and no pleading struck out only on the ground that the person bringing the proceeding

   (a) has no personal, proprietary or pecuniary interest in the proceeding; or

   (b) has suffered or may suffer injury or harm of the same kind or to the same degree as other persons.

3. While the new legislation would, in its effect, preclude the Attorney General from exercising his or her existing right to block access to the courts and, as a necessary concomitant, would also abolish relator actions, nothing in such legislation should limit or affect in any way the right of the Attorney General to commence and maintain a proceeding to the extent permissible by law.

4. With respect to the commencement and maintenance of proceedings, in determining whether the factors against proceeding outweigh the factors in favour of proceeding (see Recommendation 1(3)), the court should be required to consider,

   (a) regardless of whether or not the interest of the plaintiff is personal, proprietary or pecuniary,

      (i) whether another proceeding has been instituted against the same defendant in which the issues include those present in the proceeding that is opposed, if the interests of the plaintiff can be met by intervening in the other proceeding and it is reasonable to expect the plaintiff to do so;

      (ii) whether to proceed would be unfair to persons affected, but the fact that the outcome may affect a person whose interest is personal, proprietary or pecuniary shall not necessarily be considered unfair; and

      (iii) whether or not another reasonable and effective method exists to raise the issues that are sought to be litigated; and

   (b) where the interest of the plaintiff is not personal, proprietary or pecuniary,

      (i) whether the issues raised in the proceeding are trivial, and

      (ii) the number of persons affected in any way, whether personally or otherwise;

   and the court may consider any other factor that the court considers just.

5. (1) Subject to Recommendations 5(2) and (3), the present law respecting the entitlement of a defendant to bring a motion to challenge the right of a person to commence and maintain a proceeding, and the discretion of the court to defer the issue for consideration until after the hearing of the merits, should be retained.

   (2) On a motion challenging the right of a person to commence and maintain a proceeding, the court should be required to defer the issue for consideration until after the hearing of the merits of the case, unless the court is satisfied that, in the particular circumstances of the case, it is desirable that the issue should be determined at an earlier time.

   (3) The decision of the court to adjourn the issue for consideration until after the hearing of the merits should not be appealable.

6. The provisions for the commencement and maintenance of a proceeding in the proposed *Access to Courts Act* should be in addition to, and not in derogation of, any right to commence and maintain a proceeding that is conferred by or under any other Act.

## INTERVENTION (CHAPTER 5)

7. In the hope and expectation that the interpretation of Rule 13 of the Rules of Civil Procedure will be influenced by the principles and policies governing the Commission's liberalized regime respecting the commencement and maintenance of proceedings, Rule 13 should be retained and be given an opportunity to evolve over time on a case-by-case basis. However, in the event that Rule 13 should not develop in this direction, it should be reconsidered with a view to reform.

8. Nothing in the Commission's proposals should limit or affect in any way the right of the Attorney General to intervene in a civil proceeding initiated by another person, to the extent permissible by law.

9. No person should be denied leave to intervene in a proceeding solely because the Attorney General is already a party or intervenor in the proceeding.

10. A person who commences a proceeding to enjoin conduct that is an offence under a statute of the Legislative Assembly of Ontario or of the Parliament of Canada should be required to give notice of the commencement to the Minister who is responsible for the administration of the statute, except that in the case of the *Criminal Code* (Canada) the notice should be to the Attorney General for Ontario. In addition, further notice should be given to such other Minister as the court directs.

## COSTS (CHAPTER 6)

11. (1) No costs should be awarded against a person who commences a proceeding where

    (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;

    (b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has such an interest, it clearly does not justify the proceeding economically;

    (c) the issues have not been previously determined by a court in a proceeding against the same defendant; and

    (d) the defendant has a clearly superior capacity to bear the costs of the proceeding,

    unless the person has engaged in vexatious, frivolous or abusive conduct.

    (2) A motion for a declaratory order determining whether a person has a costs immunity may be brought at any time in a proceeding.

12. The costs immunity provided in Recommendation 11(1) does not apply to motions.

13. An order for security for costs should not be made against a person who has a costs immunity.

14. Where a person who has a costs immunity is successful and the judgment is not more favourable than the terms of an offer to settle made and served by an opposing party, that person is entitled to party and party costs to the date that the offer to settle was served, but the court may award him or her party and party costs after that date.

15. (1) A person who has a costs immunity pursuant to Recommendation 11(1) and his or her lawyer should be entitled to enter into an agreement in writing that stipulates that the latter will be entitled to receive payment for fees, costs, disbursements or charges only in the event of success in the proceeding.

    (2) An agreement made pursuant to Recommendation 15(1) may not specify the amount payable in the event of success as a gross sum, percentage, or commission.

    (3) However, subject to the prohibition in Recommendation 15(2), an agreement made pursuant to Recommendation 15(1) may include an amount payable in respect of fees that is reasonable compensation for the risk of non-payment assumed by the lawyer.

16. If a person is successful in resisting a challenge to his or her right to commence and maintain a proceeding, costs in respect of that challenge should be awarded on a solicitor and client scale, payable forthwith, unless the court is satisfied that the challenge, although unsuccessful, was nevertheless reasonable.

17. Costs should not be awarded against an intervenor in the following circumstances:

    (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;

    (b) the intervenor has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the intervention economically; and

    (c) the intervenor has contributed significantly to the resolution of the issues,

    except where the intervenor has engaged in vexatious, frivolous or abusive conduct.

18. An intervenor should not be entitled to recover costs from a person who has a costs immunity under Recommendation 11(1).

# CONCLUSION AND ACKNOWLEDGMENTS

## 1. CONCLUSION

The thrust of this report has been to replace the existing law of standing in civil proceedings with an entirely new, more liberal approach, to be enacted in the proposed *Access to Courts Act*. The essential purpose of the Act is to increase access to the judicial system by removing barriers that unjustifiably prevent individuals from bringing certain important issues before the court. This will be of particular significance in respect of so-called "public interest" litigation, and notably in the area of environmental law, where the existing standing rules are most restrictive and, therefore, most in need of fundamental reform.

## 2. ACKNOWLEDGMENTS

This report is the result of the efforts of a number of persons, whose assistance we gratefully acknowledge.

First, we wish to express our appreciation to the Project Director, Professor W.A. Bogart, of the Faculty of Law, University of Windsor, for his dedication and invaluable contribution throughout the project. We also wish to record our gratitude to the members of the research team who prepared background papers for discussion at meetings chaired by Professor Bogart: Mr. William L. Vanveen, of the Ontario Bar; Mr. H.S. Fairley, of the Ontario Bar; Professor C.J. Wydrzynski, of the Faculty of Law, University of Windsor; Professor Bryant G. Garth, of the Law School, University of Michigan, Ann Arbor, Michigan; and Mr. Andrew J. Roman, Executive Director and Counsel, Public Interest Advocacy Centre. A special acknowledgment is due Mr. Vanveen, who prepared several research papers and who, with Professor Bogart and members of the Commission's internal staff, assisted in the development of our reform proposals.

The Commission also acknowledges, with thanks, the contribution of Mr. Robert J. Sharpe, Executive Legal Officer, Supreme Court of Canada, who prepared a paper on constitutional issues.

A number of people kindly responded to inquiries made on behalf of the Commission, for whose cooperation we are grateful: Ms. Erika Abner, formerly associated with the Canadian Civil Liberties Association; Ms. Nan Aron, Executive Director, Alliance for Justice, Washington, D.C.; Ms. Pauline Ascoli, Assistant to the Federal Court Rules Committee, Federal Court of Canada; Mr. Michael W. Bader, QC, Law Officer, Crown Law Office—Civil, Ontario Ministry of the Attorney General; Mr. A. Alan Borovoy, General Counsel, Canadian Civil Liberties Association; Mr. Robert E. Charney, Counsel, Constitutional Law Office, Ontario Ministry of the Attorney General; Professor

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Finally, the Commission wishes to express its appreciation to the members of the legal staff who participated in the writing of this report: Ms. J.A. Bellis; Mr. L.M. Fox, Senior Counsel; Mr. J.J. Morrison; Mr. P.M. Sibenik; Mr. M.A. Springman, General Counsel and Director of Research; and two former members of our staff, Ms. M.L. Leitman and Ms. L. Hendlisz. Particular thanks are due Mr. Fox and Ms. Leitman for their dedicated efforts in the course of this project. We also wish to thank Ms. M.P. Richardson, former Counsel to the Commission, for her contribution to this project.

All of which is respectfully submitted,

James R. Breithaupt
Chairman

H. Allan Leal
Vice Chairman

Earl A. Cherniak
Commissioner

J. Robert S. Prichard
Commissioner

Margaret A. Ross
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March 15, 1989

## APPENDIX 1

### Draft Act

**Bill 00** **198____**

### An Act respecting Access to Courts

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Purpose of Act

1. The purpose of this Act is to increase access to the courts.

Commencement of proceedings

2.—(1) Any person may commence and maintain a proceeding unless a party satisfies the court that there exist factors against proceeding that outweigh the factors in favour of proceeding.

Grounds for refusal

(2) In determining whether the factors against proceeding outweigh the factors in favour of proceeding, the court shall consider,

(a) where the interest of the plaintiff is not personal, proprietary or pecuniary,

(i) whether the issues raised in the proceeding are trivial, and

(ii) the number of persons affected in any way, whether personally or otherwise;

(b) whether another proceeding has been instituted against the same defendant in which the issues include those present in the proceeding that is opposed, if the interests of the plaintiff can be met by intervening in the other proceeding and it is reasonable to expect the plaintiff to do so;

(c) whether to proceed would be unfair to persons affected, but the fact that the outcome may affect a person whose interest is personal, proprietary or pecuniary shall not necessarily be considered unfair; and

(d) whether or not another reasonable and effective method exists to raise the issues that are sought to be litigated;

and the court may consider any other factor that the court considers just.

Idem

(3) No proceeding shall be dismissed and no pleading struck out only on the ground that the person bringing the proceeding

(a) has no personal, proprietary or pecuniary interest in the proceeding; or

(b) has suffered or may suffer injury or harm of the same kind or to the same degree as other persons.

Intervenor

(4) No person shall be denied leave to intervene in a proceeding solely because the Attorney General is a party or intervenor in the proceeding.

In addition to provisions in other Acts

(5) The provisions for the commencement and maintenance of a proceeding in this Act are in addition to and not in derogation of any right to commence and maintain a proceeding that is conferred by or under any other Act.

Motion for refusal

3.—(1) The determination of any question raised as to the right of a person to commence and maintain a proceeding shall be deferred by the court until after the hearing of the merits of the case, unless the court is satisfied that, in the particular circumstances of the case, it is desirable to determine the question at an earlier time.

Appeal from deferral of motion

(2) No appeal lies from the decision of a court to defer the determination of a question under subsection (1).

Notice of application to enjoin offence

4.—(1) A person who commences a proceeding to enjoin conduct that is an offence under a statute of the Legislative Assembly of Ontario or of the Parliament of Canada shall give notice of the commencement to the Minister who is responsible for the administration of the statute, except that in the case of the *Criminal Code* (Canada) the notice shall be given to the Attorney General for Ontario.

Idem

(2) Further notice under subsection (1) shall be given to such other Minister as the court directs.

Costs immunity

5.—(1) No costs shall be awarded against a person who commences a proceeding where,

(a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties;

(b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the proceeding economically;

(c) the issues have not previously been determined by a court in a proceeding against the same defendant; and

(d) the defendant has a clearly superior capacity to bear the costs of the proceeding,

unless the conduct of the person who commences the proceeding is vexatious, frivolous or abusive.

Costs on motions

(2) Subsection (1) does not apply to costs awarded on a motion in the proceeding.

Declaration as to costs immunity

(3) The court may, upon motion at any time in a proceeding, make a declaratory order determining the application of subsection (1) to a party.

Security for costs

(4) An order for security for costs shall not be made against a person to whom subsection (1) applies.

Costs where offer of settlement

(5) Where a party who has an immunity against costs under subsection (1) is successful and the judgment is not more favourable than an offer of settlement that was made and served by an opposing party, the successful party is entitled to party and party costs incurred only up to the time that the offer of settlement was served, but the court may award him or her party and party costs incurred after that date.

Agreement for costs in event of success

6.—(1) It is lawful for a person who has an immunity against costs under subsection 5(1) to enter into an agreement in writing with his or her solicitor that provides that the solicitor is entitled to be paid fees, costs, disbursements or charges only in the event of success in the proceeding.

Idem

(2) An agreement referred to in subsection (1) shall not specify the amount payable in the event of success as a gross sum, commission or percentage, but the amount payable in respect of fees may include reasonable compensation for the risk of non-payment assumed by the solicitor.

Costs where standing challenged

7. Where a person is successful in resisting a challenge to his or her right to commence and maintain a proceeding, costs in respect of that challenge shall be awarded on a solicitor and client scale, payable forthwith, unless the court is satisfied that the challenge, although unsuccessful, was nevertheless reasonable.

Costs of intervenor

8.—(1) No costs shall be awarded against an intervenor in a proceeding where

(a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties;

(b) the intervenor has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the intervention economically; and

(c) the intervenor has contributed significantly to the resolution of the issues,

unless the conduct of the intervenor is vexatious, frivolous or abusive.

Subject to costs immunity

(2) No costs shall be awarded in favour of an intervenor against a person against whom party and party costs cannot be ordered under section 5.

Short title

9. The short title of this Act is the *Access to Courts Act, 19* .

# APPENDIX 2

# REFORM PROPOSALS IN OTHER JURISDICTIONS

## 1. INTRODUCTION

The law of standing has been considered by a number of law reform agencies in other jurisdictions, including the Law Reform Commission of British Columbia (1980), the Australian Law Reform Commission (1977, 1985), the Law Reform Commission of Western Australia (1981, 1986), the Law Reform Committee of South Australia (1984), the English Law Commission (1976), the New Zealand Public and Administrative Law Reform Committee (1978) and the Law Reform Commission of Ireland (1979). In this Appendix, we shall examine the major reform proposals recommended by each of these agencies. We note at the outset that the first two bodies were concerned with standing in "public interest" litigation, and that the others addressed standing in the context of administrative law, whereas our report deals with standing in civil proceedings generally.

## 2. BRITISH COLUMBIA

### (a) Introduction

In its *Report on Civil Litigation in the Public Interest*,[1] the Law Reform Commission of British Columbia envisaged a standing regime that offered both continuity and change in the context of "public interest" litigation. The Commission began its analysis of the need for reform by expressing two concerns with the Attorney General's monopoly on the initiation of public interest litigation. First, it stated that his "dual position both as a member of the government and as the guardian of the rights of the public" could give rise to an impression that he had a conflict of interest.[2] Since the Attorney General's discretion regarding the institution of a relator action is absolute, the courts have declined to review the exercise of that discretion.

Second, the Commission was concerned about the existence of such an unqualified discretion since, "generally speaking, he [the Attorney

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[1] Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, LRC 46 (1980) (hereinafter referred to as "British Columbia Report").

[2] *Ibid.*, at 56.

General] plays a limited role in the conduct of a relator action...".[3] It noted that, once the Attorney General consents to litigation, he often has nothing else to do with it. The Commission concluded as follows:[4]

> [T]he right to maintain a civil action to vindicate public rights should not necessarily remain within the Attorney General's exclusive jurisdiction. We do not mean to suggest that the Attorney General is never the appropriate plaintiff in such situations, merely that we consider that he may not always be the *only* appropriate plaintiff. In our view, the law on standing might be widened so as to allow a private individual to maintain an action in the public interest in situations where he is unable to do so at present.

The Commission then examined, and rejected, three reasons often cited in support of restrictive standing rules. First, it stated that the "floodgates" argument was often exaggerated. It was of the view that public apathy, as well as the expense and inconvenience of litigation, would prevent an unmanageable number of multiple proceedings, and that there were better ways to deal with any problems occasioned by such proceedings than by restricting standing.

The Commission also rejected a second rationale for a restriction on standing, namely, the needs of the adversary system. It stated as follows:[5]

> We do not endorse the assumption that the law of standing assures that counsel, or for that matter a lay litigant, will make an able presentation to the courts. There is no evidence to suggest that parties to whom the court denies standing would not make as able a presentation than parties whose standing the courts upheld.

The Commission saw some merit in the third rationale for a restrictive standing regime, that is, the desire to eliminate the meddlesome interloper. But it noted that, under the present law, the decision as to who was a "busybody" was made by the Attorney General. The Commission concluded as follows:[6]

> We do not believe that the Attorney General, as a matter of principle, should be open to such criticism[7] nor should his decisions be the subject of speculation. As we have already suggested it does not seem unreasonable to expect a court to exercise its discretionary powers to thwart attempts by 'busybodies' to abuse the judicial system, and while this might attract some criticism at least the courts are less likely to be accused of bowing to political pressure.

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[3] *Ibid.*, at 58.

[4] *Ibid.*, at 58-59 (emphasis in original).

[5] *Ibid.*, at 61.

[6] *Ibid.*

[7] That is, criticism "whatever he decides" concerning the granting or denial of his fiat.

### (b) Recommendations

#### (i) General

The Commission's principal recommendation was as follows:[8]

> We support the general proposition that any member of the public should have the status to bring proceedings in respect of an actual or apprehended violation of a public right, whether it be an infraction of a statute, a public body exceeding its power or a public nuisance. We do not believe that the right to bring such proceedings should remain within the Attorney General's exclusive jurisdiction.

The Commission defined the term "public interest proceeding" in its draft legislation, as follows:[9]

> 50.—In sections 51, 52 and 53, 'public interest proceeding' means a civil proceeding which can by law but for section 51, be brought by the Attorney General, either on his own initiative or at the request of a relator, in the Supreme Court, in respect of a present or apprehended violation of a public right, including a proceeding
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> (a) in respect of a public nuisance, or
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> (b) to restrain
>
> (i) a person from violating an enactment, or
>
> (ii) a public body from exceeding its powers.

Before turning to the specific recommendations on the procedure by which the Commission envisaged standing could be accorded in "public interest proceedings", we should examine the scope of this concept, particularly with respect to the enumerated provisions in section 50(a) and (b) of the draft legislation. It should be noted at the outset, however, that the Commission's report did not indicate what types of proceeding, other than the proceedings expressly listed in paragraphs (a) and (b) of draft section 50, would be embraced by the phrase "a present or apprehended violation of a public right".

#### (ii) Public Nuisance

Section 50(a) of the draft legislation embodies the Commission's recommendation that "any member of the public should be able to maintain an action in respect of a public nuisance" without having to prove special

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[8] British Columbia Report, *supra*, note 1, at 72. But see *infra*, this Appendix, sec. 2(c), concerning certain procedural prerequisites, and sec. 2(d), concerning standing in constitutional litigation.

[9] British Columbia Report, *supra*, note 1, Draft Bill.

damage or interference with a private right.[10] It was of the view that "a person who suffers damage as a result of a public nuisance should not be precluded from seeking relief merely because that damage differs in degree rather than kind from that suffered by the public at large".[11]

#### (iii) Restraining Statutory Violations

As evidenced by section 50(b)(i) of the draft legislation, the Commission recommended that private individuals should be able to seek injunctions to enjoin infractions of a statute. It stated that any potential concerns with the procedure, which would be used in limited circumstances in any event, could be resolved by the courts.

#### (iv) Restraining Public Bodies from Exceeding Their Powers

Section 50(b)(ii) of the draft legislation reflects the Commission's recommendation that any member of the public should be entitled to challenge public bodies exceeding their powers, and that the entitlement to mount such a challenge should be included within a more general entitlement to maintain an action to vindicate a public right.

### (c) Procedure

While the Commission took a wide view of "public interest proceedings", it wanted the Attorney General to have the opportunity to exercise his traditional right to initiate or lend his name to such proceedings. Thus, the Commission recommended as follows:[12]

> We suggest that where a person wishes to maintain an action in respect of an alleged interference with a public right, and such an action is one which at present can only be brought in the name of the Attorney General, either *ex officio* or in a relator action, that person should serve an application on the Attorney General, together with a copy of the proposed originating process. On receipt of this application, the Attorney General should have the option either to commence and conduct the action himself or consent to the use of his name in a relator action. Thus, up to this stage, we would not be recommending any change to the present practice and procedure.

If the Attorney General did not assume a traditional litigious role within ten days, the proposed plaintiff could commence the proceeding in his own name, although only with the consent of the court. The Commission was of the

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[10] *Ibid.*, at 69.

[11] *Ibid.* See, also, *ibid.*, Draft Bill, s. 53.

[12] *Ibid.*, at 73.

view that "such consent should be given automatically unless the court considers there is not a justiciable issue to be tried".[13] Both the Attorney General and the proposed defendant would be served with the notice of application for consent, and they could oppose the application on the grounds of non-justiciability. The court could attach conditions to its consent in such applications, but the Commission did not specify the kinds of conditions that could be made. Where consent had been granted, the Attorney General could intervene in the proceeding or be joined as a party of record. The Commission was of the view that by deciding the issue of standing before the proceeding was commenced, there would be a saving of time and expense.

The desirability of retaining some type of "gatekeeper" role for the Attorney General in public interest litigation was explained in the following terms:[14]

> We believe it desirable that the Attorney General should continue to have an opportunity to participate and exercise some degree of control over public interest suits. He may wish to participate for a number of reasons. For example, he may have doubts as to the competence of the person to conduct the proceeding, or that the case is one which would benefit from having the full resources of his ministry behind it.

In our view, the recommendation to retain a role for the Attorney General in public interest proceedings poses several problems. First, while the Commission explained why, in its opinion, the Attorney General should continue to have a role in public interest proceedings, it did not explain why it was necessary that he continue to have a gatekeeper role, albeit of diminished significance, as opposed to some other kind of role. For example, the Commission could have recommended that the Attorney General continue to have a right or opportunity to bring actions in his own name or on his own initiative, that he be allowed to intervene in the proceedings, or that he be allowed to challenge standing under the ordinary rules of practice.

A second difficulty with the partial retention of the gatekeeper role is that it might expose the Attorney General to an apparent, or even real, conflict of interest, regardless of whether or not he authorizes the lawsuit. Indeed, the gatekeeper role can force him to make the kind of decisions that the British Columbia Commission found objectionable in the present law.

And, finally, the Commission's proposal would not replace the existing standing regime. Rather, it would create a separate and distinct regime for "public interest" proceedings. Thus, it is conceivable that a plaintiff might commence a proceeding based on the existing law instead of the legislation envisaged by the Commission, and if standing were later successfully challenged (a circumstance not addressed in the draft legislation), he would have to

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[13] *Ibid.*

[14] *Ibid.*, at 72.

start all over again, pursuant to the new legislation. Moreover, there would be two different streams of standing—one based on pre-existing law (which presumably would continue to evolve), the other based on the new legislation.

### (d) Standing in Constitutional Litigation

The Commission recommended the creation of a separate standing regime for public interest proceedings that involve a constitutional challenge. It stated that there were "no persuasive reasons" to restrict a member of the public from seeking a declaration as to the constitutionality of legislation. It found support for this view in *Thorson v. Attorney-General of Canada*[15] and *Nova Scotia Board of Censors v. McNeil*,[16] which "would appear to give a court a discretion whether or not to accord an individual standing".[17] The Commission was concerned "that the courts might exercise this new discretion . . . in only exceptional circumstances, such as when the plaintiff can demonstrate that he is 'directly affected' . . . , or when all other avenues for questioning the constitutionality of legislation have been closed".[18] Therefore, it stated as follows:[19]

> It is our view that proceedings to question the validity of a statute should not be encompassed within our principal recommendation. To our mind, they are separate and distinct from other types of public interest suits. Furthermore, as Laskin J. pointed out in the *Thorson* case, the validity of a statute is always a 'justiciable' issue and, consequently, that part of our general recommendation that hinges on justiciability is inapplicable to constitutional cases. We therefore recommend that the right of any member of the public to seek a declaration as to the constitutionality of provincial or federal legislation be given by statute.[20]

### (e) Damages for Public Nuisance

In its report, the Commission also made important recommendations regarding damages for public nuisance. It recommended that the courts should have complete discretion to award damages in addition to, or in substitution for, an injunction in public nuisance cases, just as they already can in private nuisance cases. The damages should be limited "to an amount that represents the

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15 [1975] 1 S.C.R. 138, (1974), 43 D.L.R. (3d) 1.

16 [1976] 2 S.C.R. 265, (1975), 55 D.L.R. (3d) 632.

17 British Columbia Report, *supra*, note 1, at 71.

18 *Ibid.*

19 *Ibid.*, at 72.

20 The Commission recommended (*ibid.*, Draft Bill) that the following provision be added to the *Constitutional Question Act*, R.S.B.C. 1979, c. 63:

> 10.—Any person may commence a proceeding in the Supreme Court for a declaration that an enactment of the Province or of Canada is invalid whether or not consequential relief is or could be claimed and whether or not the person has an interest in or is affected by the enactment.

cost of remedying or repairing the effects of the nuisance".[21] Courts would have the power to direct how the award would be applied and dispersed. The award would be "payable to the Attorney General who would then have a duty to spend the amount awarded to remedy the damage caused by the nuisance".[22] In awarding damages for public nuisance, the court would be directed to take into account a wide variety of circumstances.

Insofar as this recommendation would cause an undue multiplicity of proceedings in respect of the same nuisance, the Commission stated that a consolidation order, for example, could be made. Finally, the Commission was of the view that its recommendations on damages for public nuisance were severable from the principal recommendation to widen standing in public nuisance cases.

## 3. AUSTRALIA[23]

### (a) Australian Law Reform Commission

#### (i) Introduction

The Australian Law Reform Commission has undertaken a project, referred to it by the Attorney General, on access to courts exercising federal jurisdiction.[24] The two main components of this reference are standing in public interest litigation and class actions. With respect to the former, the Australian Commission has released a Working Paper (1977),[25] a Discussion Paper (1977),[26] and a final Report (1985).[27] It should be noted that there has been some evolution in the views of the Australian Commission in these three studies. It should also be noted that all three studies examine standing in public interest litigation, including private prosecutions. However, given the ambit of our own study, we shall not examine the latter.

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21 British Columbia Report, *supra*, note 1, at 71. See, also, *ibid.*, Draft Bill, s. 52(1).

22 *Ibid.*, at 71. See, also, *ibid.*, Draft Bill, s. 52(2).

23 It should be noted that there are other, generally older, Australian studies that we do not discuss here: see Australia, The Law Reform Commission, *Standing in Public Interest Litigation*, Report No. 27 (1985) (hereinafter referred to as "Australian Report"), paras. 9-11, at 6-7.

24 See, generally, Australia, The Law Reform Commission, *Access to Courts - 1 Standing: Public Interest Suits*, Working Paper No. 7 (1977) (hereinafter referred to as "Australian Working Paper"), paras. 1.11.2, at 1.

25 Australian Working Paper, *supra*, note 24.

26 Australia, The Law Reform Commission, *Access to the Courts - 1 Standing: Public Interest Suits*, Discussion Paper No. 4 (1977) (hereinafter referred to as "Australian Discussion Paper").

27 Australian Report, *supra*, note 23.

### (ii) Working Paper

#### *a. Introduction*

In the Working Paper, the Australian Commission stated that a liberalized standing regime raises the following policy questions:[28]

(a) the importance of enforcement of the rule of law;

(b) administrative inconvenience and uncertainty resulting from constitutional challenge;

(c) the possibility of a multitude of actions resulting from enlarged standing; and

(d) abuses of standing rights to the prejudice of individual litigants.

The Commission was of the view that these questions would not pose insurmountable difficulties if standing were liberalized.[29]

#### *b. Alternative Models*

##### *(1) Introduction*

Working on the assumption that standing should be liberalized, the Commission proposed three models of standing for "proceedings in the public law area . . .".[30] In this regard, it stated at the outset that there was "considerable virtue in adopting a single standing rule", regardless of the relief being sought.[31]

##### *(2) Open Door Model*

The first model was to allow anyone to initiate a proceeding, "relying upon the discipline of costs to limit actual cases to those in which a plaintiff had a real interest".[32] The Commission was attracted to this model as being "more correct in principle [than a model based on a general formula[33]] since it recognizes and affirms the proper interest of all citizens in the performance

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[28] Australian Working Paper, *supra*, note 24, para. 2.55, at 50.

[29] See, generally, *ibid.*, paras. 2.56-2.69, at 50-59.

[30] *Ibid.*, para. 2.72, at 60. The Commission also used the expression "public interest actions", that is, "actions in which a person seeks to prevent a breach of a general public law" (*ibid.*, para. 2.3, at 15).

[31] *Ibid.*, para. 2.70, at 59.

[32] *Ibid.*, para. 2.72, at 60.

[33] The "general formula" model is discussed *infra*, this Appendix, sec. 3(a)(ii)b(4).

of public duties".[34] But it rejected this "open door" model for a number of reasons. First, the Commission was concerned that an "open door" would not provide a means of controlling multiple suits over the same issue. Thus, the Commission believed that there should be "retention of some screening process, or, at least, a rule allowing summary dismissal where an issue has already been determined on its merits in bona fide litigation".[35] Moreover, it was concerned about the impact on statutory appeals from subordinate courts and administrative tribunals. It was of the view that some statutory appeals were "so closely associated with an individual, or . . . require such special procedures, that an 'open door' policy is undesirable for them".[36]

### *(3) Preliminary Certification*

The Commission also considered a "preliminary screening procedure whereby standing is determined [on the application of a potential plaintiff] in advance of the substantive issues".[37] The Commission rejected this "certification" model for several reasons. First, it did not like the idea of determining standing apart from the merits because the two "are often intertwined".[38] Second, such a procedure would be onerous for those plaintiffs who think they have standing by virtue of the present law, but who subsequently have their standing successfully challenged by the defendant: such plaintiffs would then have to start over again and apply for certification.[39] Third, the Commission was of the view that the costs and expense of this extra stage in litigation would outweigh the benefits, especially insofar as public interest groups are concerned.[40]

### *(4) General Formula: "Real Concern"*

The final model considered by the Australian Commission was the adoption of a "general formula such as that recommended by the [English] Law Commission or that currently in use in the United States so as to enable the courts to screen plaintiffs as part of their determination of a case . . .".[41] The Commission criticized the English Law Commission's formula of

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[34] Australian Working Paper, *supra*, note 24, para. 2.93, at 71.

[35] *Ibid.*, para. 2.74, at 61.

[36] *Ibid.*, para. 3.51, at 98.

[37] *Ibid.*, para. 2.72, at 60.

[38] *Ibid.*, para. 2.92, at 70.

[39] *Ibid.*

[40] *Ibid.*, para. 2.92, at 70-71.

[41] *Ibid.*, para. 2.72, at 60. The Commission stated that the standing decision would be "made by the court during the hearing of the suit and without preliminary application" (*ibid.*, para. 2.93, at 71).

"sufficient interest" because it "may insufficiently convey a legislative intention to widen standing".[42] In particular, it was concerned that "the word 'interest' might be accorded its traditional interpretation of importing a financial or pecuniary stake".[43] Instead, the Commission fastened upon the phrase "matters of real concern to the plaintiff"[44] and would require the defendant to show that a particular plaintiff did not qualify in any particular case. The intention behind the formulation was "to render standing a nonissue in the overwhelming proportion of public interest cases".[45]

Yet, in the end, the Commission, even after engaging in a lengthy sifting process among various expressions to be used, seemed dubious that any formula could convey the essence of a determination on the question of standing. It selected its particular phrase ("matters of real concern to the plaintiff") with the ambivalent comment that it "would appear to be as good as any".[46]

### (iii) Discussion Paper

In the Discussion Paper, the Commission examined standing in the context of access to the courts, that is, "the ability of the citizen to invoke the machinery of justice, to force some person or instrumentality to do something, to obey the law or carry out a duty".[47] In this regard, however, the Commission clearly did not envisage that all persons should have access to the courts for all purposes:[48]

> As a general proposition people ought to be able to submit legal disputes to the courts for resolution and to invoke the aid of the courts in enforcing the law. However, the courts lose, and with them society, if they depart from their proper role of settling disputes according to law; care will always need to be taken that proceedings are properly conducted in the presence of parties genuinely concerned with the merits of the matter.

The Commission considered whether the floodgates argument was a valid reason for restricting standing rights. It noted that the broadening of standing rights in the United States, Canada and Australia, had not resulted in a significant increase in litigation.[49]

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[42] *Ibid.*, para. 2.77, at 62.

[43] *Ibid.*

[44] *Ibid.*, para. 2.79, at 63.

[45] *Ibid.*, para. 3.52, at 98.

[46] *Ibid.*, para. 2.80, at 64.

[47] Australian Discussion Paper, *supra*, note 26, at 3.

[48] *Ibid.*, at 6.

[49] See, generally, *ibid.*, at 6-8.

The Commission then examined the present standing rules in public interest litigation, and in this regard it was particularly concerned with the role of Attorneys General. It noted that Attorneys General sit in Cabinet and that lawyers working for Attorneys General advise other departments of government —the very entities who are often defendants in actions where standing is a problem.[50]

The "latent conflict between Cabinet power and the independence of the Attorney" led the Commission to express the following view:[51]

> Some conflict may be inevitable but the danger area should be reduced as much as possible. In an age where many public interest suits are against government the relator procedure increases conflict. It seems better to divorce the Attorney-General completely from the plaintiff's interests and allow him, uninhibitedly, to advise the government of which he is a member.

The Commission also expressed a view as to the general nature of the reform that was needed. It stated as follows:[52]

> Whatever the desirable position in England the Commission is of the view that the time has come, in Australia, to provide an alternative to the relator action so as to permit private individuals to approach the court in public interest cases. The procedure should be such as to enable the Attorney-General to intervene and put [that is, argue] relevant public interest matters. The courts would, of course, retain their present discretion as to the granting of relief and their present cautious policy in respect of injunctions to restrain anticipated criminal offences.

### (iv) Report

#### *a. Introduction*

In the Australian Commission's final report, the Commission stated that there were four major considerations that had to be borne in mind in making recommendations for reform. First, "public interest litigation imposes new challenges on the courts (particularly in relation to review of administrative action), and . . . doubts are sometimes raised as to whether the courts can adequately meet these challenges".[53]

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[50] *Ibid.*, at 8-9. The Commission highlighted instances where an Attorney General, or the government with which he was associated, had taken measures to block access to the courts. In fact, it was not until the 1970's that the first Commonwealth fiat to attack the validity of Commonwealth legislation was granted: see, generally, *ibid.*, at 9-10. See, also, *ibid.*, at 13.

[51] *Ibid.*, at 13-14.

[52] *Ibid.*, at 14.

[53] Australian Report, *supra*, note 23, para. 147, at 80.

The second consideration was whether it was "appropriate in modern times" to retain the principle that the Attorney General is the only person able to "institute equitable proceedings to enforce 'public rights' without having to establish a 'special interest' or the infringement of a private right".[54]

Third, if it were determined that a personal interest was not a prerequisite to instituting public interest litigation, then a question is raised concerning what criteria, if any, could or should be used to exclude "busybodies", those with "no genuine concern in the subject-matter of the litigation", or those "who lack the skill and resources to represent the public interest adequately".[55]

Finally, it had to be determined whether there should be uniform criteria for standing "in the different strands in public interest litigation—prerogative writs, equitable remedies and statutory remedies".[56]

### *b. Recommendations*

#### *(1) Ambit*

The Commission recommended in its final report that the law of standing should be reformed for the following types of proceedings: proceedings for prerogative, declaratory or injunctive relief in respect of a matter involving the Constitution or a Commonwealth or Territory statute, or against the Commonwealth or its officers; proceedings for an injunction or a declaration in circumstances where the Attorney General could have commenced the proceeding in his own name; and proceedings for relief under certain Commonwealth statutes and Australian Capital Territory ordinances.[57] The Commission also recommended that, if a proceeding were commenced not only for a remedy covered by one of the foregoing proceedings, but also for a remedy not so covered, then the new standing rules should apply only in relation to the former remedy.[58]

The Commission recommended that its proposed standing test "should supersede all general law criteria of standing within the range of proceedings covered by this report."[59] The Commission also recommended as follows:[60]

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[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] See, generally, *ibid.*, para. 85, at 45, and para. 88, at 45-46. See, also, *ibid.*, Draft Bill, s. 3(1).

[58] *Ibid.*, para. 87, at 45.

[59] *Ibid.*, para. 267, at 144.

[60] *Ibid.*, para. 267, at 144-45.

> It [the proposed test] should also supersede virtually all the statutory tests of standing to sue in courts which the Commission has identified as such within Commonwealth and relevant Territorial legislation and which are attached to statutory remedies similar in function to the recognised general law remedies of a public law nature (that is, to the prerogative writs and to the remedies of injunction and declaration when invoked to enforce 'public rights').

It offered three arguments in support of the latter recommendation. First, it found "a great deal of similarity between the expressions commonly found in statutes . . . and the various tests used to determine standing in public interest litigation under the general law".[61] This led the Commission to the following view:[62]

> It can be assumed that, when Parliament imposes restrictions in the nature of standing restrictions on a statutory cause of action, and does so in a manner similar to the general law, it is Parliament's intention that any subsequent reforms of standing of general law (whether effected by statute or by judicial decisions) will apply to the statutory cause of action.

Second, the Commission was of the view that a "high premium" should be placed on uniformity.[63] It noted that "[a] remedy or a set of remedies available at general law sometimes has a close parallel in a statutory remedy or set of remedies", thereby giving litigants an option as to how to proceed in challenges of administrative action.[64] But "[t]here is no reason in principle for having different standing tests for what is, essentially, the same relief".[65]

Third, the Commission was of the view that "[a] valuable opportunity to rationalise and simplify the law of standing would be lost if new tests of standing were made applicable only to cases where the general law criteria presently apply".[66]

The Commission conceded that replacing "all existing criteria of standing in statutory remedies which are similar in function to the recognized 'public law' remedies" with the proposed standing test "would give rise to two major difficulties".[67] First, it would not always be possible to determine "whether a particular statutory provision can properly be said to establish a criterion of

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61 *Ibid.*, para. 267, at 145.

62 *Ibid.*

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*, para. 268, at 145.

standing".[68] And second, "it is often a matter of fine judgment as to whether a statutory remedy is similar in function to the recognized 'public law' remedies".[69]

Finally, the Commission conceded that its proposed legislation could not prevent Parliament from subsequently creating statutory remedies with standing rules different from the ones it envisaged. However, it recommended that its proposed regime be adopted "in any future legislation which establishes new statutory remedies of a 'public law' nature".[70]

### *(2) The Formula: "Merely Meddling"*

After considering various formulae defining the standing of private plaintiffs, the Commission recommended that "standing should be denied to any person who, in instituting the relevant proceeding, is 'merely meddling' in its subject-matter".[71]

The Commission recommended that a personal stake in the litigation should be a sufficient, but not a necessary, condition of standing. It stated as follows:[72]

> Plaintiffs asserting a private right or a 'special interest' in undertaking the relevant litigation should not be treated as 'merely meddling'. Accordingly, their capacity

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[68] *Ibid.* The Commission elaborated as follows (*ibid.*) (emphasis in original):

> When a statute provides, for instance, that a member of a company may apply to the court for relief against 'oppressive' conduct of the company's business, this can be viewed *either* as conferring a right (coupled with an appropriate remedy) on those who have become members of the company, *or* as laying down a standing requirement for a remedy directed at oppressive conduct.

[69] *Ibid.* The Commission listed the particular statutory standing provisions that would be affected by its proposed standing regime: see *ibid.*, Draft Bill, Schedules 1 and 2. The Commission did, however, recommend that the provisions regarding standing in the *Trade Practices Act 1974*, 1974, No. 51, s. 80(1)(c) and the *Administrative Decisions (Judicial Review) Act 1977*, 1977, No. 59, s. 13 "should not be superseded by the proposed new criterion, even though according to the approach just outlined this would appear to be the proper course . . .": see Australian Report, *supra*, note 23, para. 269, at 146-47.

[70] *Ibid.*, para. 270, at 147.

[71] *Ibid.*, para. 252, at 138. The draft legislation proposed by the Australian Commission (*ibid.*, Draft Bill) reads as follows:

> 8.—(1) In relation to a proceeding to which this Act applies, the principles and rules of the common law and of equity the operation of which determines the standing of the plaintiff to bring the proceeding are abolished.
>
> (2) Subject to the succeeding provisions of this section, every person has standing to commence and maintain a proceeding to which this Act applies unless the court, on application, finds that, by commencing and maintaining the proceeding, the plaintiff is merely meddling.

[72] *Ibid.*, para. 255, at 139. See, also, *ibid.*, Draft Bill, s. 8(3)(a).

> and motivation to represent the public interest in the proceeding should not be in issue. On this basis, standing would continue to be granted to plaintiffs who qualify under existing criteria within the law at present . . . . But an interest in the subject-matter of the litigation would not be a necessary condition of qualifying for standing under the 'merely meddling' criterion. The criterion would enlarge, not restrict, the range of people currently entitled to commence public interest litigation.

Nor should a plaintiff be found to be a meddler solely because his interest in the subject matter of the proceeding "is no different from the interest of any other person in that subject-matter".[73]

However, the Commission was of the view that a plaintiff with no personal stake in the subject matter of the litigation would be "merely meddling" if his "manner of presenting the issues betrays a clear incapacity or unwillingness to represent the public interest adequately in conducting the case".[74] Further, this recommendation would apply to "'dilettante' plaintiffs" and "disinterested plaintiffs".[75] But "disinterested plaintiffs" who are not manifestly unfit or unwilling to represent the public interest adequately should not be treated as 'merely meddling' simply because they do not have a personal stake in the outcome".[76]

### *(3) Onus and Procedure*

The Commission recommended that "any person should have standing to initiate a proceeding to which the proposals for standing reform apply *unless* the court is satisfied that the person is 'merely meddling' in the subject-matter of the proceeding".[77] The onus of proof would be on the party challenging standing.

It was recommended that, as a general rule, a standing challenge on the basis of "merely meddling" should be made, as at present, in the context of an application by a party to dismiss the case for want of standing. However, it stated that there should be one exception:[78]

> [W]here the ground on which standing is denied is that the plaintiff has no personal stake in the subject-matter of the litigation and lacks the motivation and capacity to conduct the case adequately as a 'private attorney-general', the court should be able to make a ruling to this effect on its own motion.

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[73] *Ibid.*, Draft Bill, s. 8(3)(b).

[74] *Ibid.*, para. 253, at 138. See, also, *ibid.*, Draft Bill, s. 8(5).

[75] *Ibid.*, paras. 253-54, at 138.

[76] *Ibid.*, para. 254, at 138.

[77] *Ibid.*, para. 259, at 140 (emphasis in original). See, also, *ibid.*, Draft Bill, s. 8(2).

[78] *Ibid.*, para. 260, at 141.

The Commission noted that, at present, there was no fixed rule as to whether standing should be treated as a preliminary issue or considered along with the merits of the case. It recommended that, as a general rule, standing should not be determined as a preliminary or interlocutory matter in the proceeding. It gave four reasons. First, substantive questions often must be resolved before standing can be determined. Second, it will often be difficult at the outset of a proceeding for a court to make an assessment of the plaintiff's capacity and motivations to conduct the proceedings—matters that the court has to consider in order to resolve the issue of standing. Third, a court's refusal to accord standing could result in a series of appeals that would delay the resolution of the proceedings, and make them more expensive. And, finally, "a court which makes an adverse ruling on the plaintiff's standing in a public interest proceeding without having considered the merits at all may seem to the public at large to be shirking its task".[79] As a result, the Commission recommended considerable flexibility in its draft legislation in this regard, which reads as follows:

> 8.—(6) The question whether the plaintiff has standing to commence and maintain a proceeding shall not be determined as a preliminary or interlocutory matter in the proceeding unless —
>
> (a) a preliminary or interlocutory application as to the plaintiff's standing has been made; and
>
> (b) the court is satisfied, in the circumstances, that it is proper to determine the question of the plaintiff's standing as a preliminary or interlocutory matter.

### (b) Law Reform Commission of Western Australia

#### (i) Working Paper

In a 1981 Working Paper on judicial review of administrative decisions,[80] the Law Reform Commission of Western Australia considered the advantages of widening the standing rules in order to allow anyone to seek judicial review. Such a change, it said, would encourage citizen participation in the enforcement of the law, thereby increasing "the likelihood of unlawful decisions being challenged", deterring "administrative illegality", and promoting "lawful and accountable government".[81] Another advantage was that it would not be necessary "to develop more restrictive rules of standing which could be difficult to apply to particular factual situations and which could

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[79] *Ibid.*, para. 261, at 142. See, generally, *ibid.*, para. 261, at 141-42 on the four rationalia.

[80] Law Reform Commission of Western Australia, *The Judicial Review of Administrative Decisions*, Working Paper, Project No. 26 – Part II (1981) (hereinafter referred to as "Western Australia Working Paper"). The study was specifically concerned with the supervisory jurisdiction of the Supreme Court: see *ibid.*, para. 1.2, at 8.

[81] *Ibid.*, para. 8.4, at 88.

become as uncertain and complex as the present law".[82] Another possible advantage of allowing anyone to apply for judicial review was that applications for relator actions—which "can prove to be embarrassing for an Attorney General"—would no longer be needed in the administrative law area.[83]

On the other hand, the Commission identified several factors that might make an open-ended standing regime "undesirable".[84] One factor was expressed in the following terms:[85]

> [T]he institution of any proceeding involves certain costs to the community, for example, the costs involved in the administration of the Supreme Court, the costs resulting from delays in other proceedings in the Court and the costs incurred by government bodies which have to defend actions. The fact that these costs will be incurred may suggest that only persons with a particular interest in a decision should be entitled to apply to have the decision reviewed or, where a person cannot establish such an interest, that some body should be given the power of balancing the costs referred to above against the benefits of allowing the lawfulness of a decision to be impugned. The relator action is one such means, though it has its difficulties. Another means would be to give the Supreme Court a discretion to grant leave for proceedings to be instituted where an applicant had no particular interest in the decision sought to be impugned.

Moreover, the Commission indicated that the nature of the standing regime had implications for the relationship between the executive and judicial branches of government. It stated as follows:[86]

> [E]ven if it is assumed that the litigant could establish some unlawfulness, it does not necessarily follow that power should be so distributed between the courts and the Administration as to allow the Judiciary to pronounce authoritatively on the legality of the conduct of the business of government whenever any member of the public chooses. Whilst the independence of the Judiciary from the political process is one of its most highly valued assets, it also limits its powers to interfere with the working of other branches of government. [Secondly] there is much to be said for the courts, as a matter of prudence, reserving their power and prestige for those occasions when they are moved by those upon whom the unlawful conduct of public authorities has tangibly impinged.

The Commission also indicated that "allowing any person to apply for judicial review . . . could lead to a flood of litigation, to the institution of

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[82] *Ibid.*

[83] *Ibid.*, para. 8.5, at 89.

[84] *Ibid.*, para. 8.7, at 89.

[85] *Ibid.*, para. 8.8, at 89-90.

[86] *Ibid.*, para. 8.9, at 90, quoting Evans, *de Smith's Judicial Review of Administrative Action* (4th ed., 1980), at 410.

unmeritorious proceedings, or to proceedings being pursued in an incompetent manner".[87] And finally, the Commission stated that "[a]nother consequence of allowing any person to apply for judicial review is that it would increase the likelihood of more than one action being instituted with regard to a particular decision".[88]

Working on the assumptions that it was "undesirable to allow any person to apply for judicial review and that only those people with some form of particular interest should be permitted to make such an application", the Commission turned its attention to the nature of the requisite interest.[89] It did so by examining the various approaches taken in Australia, England, New Zealand and British Columbia, and it concluded the discussion on standing with a statement inviting "comment as to the appropriate standing rules".[90]

### (ii) Report

In its 1986 Report, the Commission noted that there were "differences in the rules of standing of the various remedies".[91] Thus, it noted that "the rules of standing for certiorari and prohibition seem to be more liberal than those for declaration and injunction".[92] It was of the view that the inconsistency in standing criteria between the various remedies "would assume less importance" if applicants for judicial review were not forced to elect a specific remedy.[93] The Commission recommended, then, that the existing procedures for obtaining a prerogative remedy be replaced with a procedure by which "relief in the nature of these remedies would be obtained by an order in an ordinary civil action".[94]

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[87] Western Australia Working Paper, *supra*, note 80, para. 8.10, at 90. But the Commission then indicated that there were countervailing arguments or considerations with respect to these three "possible difficulties": see *ibid.* See, generally, *ibid.*, paras. 8.11-8.13, at 90-91.

[88] *Ibid.*, para. 8.14, at 91. The Commission suggested that this problem might be overcome by making provision "for the consolidation of a number of actions in a single action or for the summary dismissal of a subsequent action if the matter in dispute had been fully and properly determined in an earlier action": see *ibid.*, para. 8.14, at 91-92.

[89] *Ibid.*, para. 8.15, at 92.

[90] *Ibid.*, para. 8.36, at 101.

[91] Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions: Procedural Aspects and the Right to Reasons*, Project No. 26 - Part II (1986) (hereinafter referred to as "Western Australia Report"), para. 3.4, at 11.

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*, para. 4.20, at 25. See, also, *ibid.*, para. 4.21, at 26.

### (c) Law Reform Committee of South Australia

In its 1984 Report, the Law Reform Committee of South Australia examined standing in the context of administrative appeals.[95] The Committee recommended that a General Appeals Tribunal be created to assume "the jurisdiction of some existing appellate bodies" and to "hear appeals from the exercise of discretions . . .".[96] It also recommended that "any person whose interests are affected by the relevant [administrative] decision" should have standing to appeal to such a tribunal.[97] In this regard, it noted with approval the following provision in the Commonwealth's *Administrative Appeals Tribunal Act 1975*:[98]

> 27.—(1) Where this Act or any other enactment provides that an application may be made to the Tribunal for a review of a decision, the application may be made by or on behalf of any person or persons (including Australia or an authority of Australia) whose interests are affected by the decision.
>
> (2) An organization or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organization or association.
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> (3) Sub-section (2) does not apply in relation to a decision given before the organization or association was formed or before the objects or purposes of the organization or association included the matter concerned.

However, two members of the Committee were of the view that "the State legislation should follow the Commonwealth legislation in conferring jurisdiction only where other legislation specifically so provides", and that standing "should be specifically dealt with in each enactment conferring jurisdiction".[99] The minority's position was explained as follows:[100]

> They [the members in the minority] regard the proposal to give a right of appeal to any person whose interests are affected as too uncertain in its operation. They believe that such a wide provision could give rise to much dislocation in the business of government and in commerce. They are particularly concerned that a person who apparently has a governmental decision in his favour may find that his plans are seriously disrupted or obstructed by an appeal from an unexpected quarter and that substantial losses might thereby be incurred. If the Government decides to give a general right of appeal subject only to specific exceptions, they are unable to suggest any straight-forward way of limiting locus standi. They urge the Government if it does proceed by way of giving a general right of appeal to

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95 South Australia, *Eighty-Second Report of the Law Reform Committee of South Australia to the Attorney-General, Relating to Administrative Appeals* (1984) (hereinafter referred to as "South Australia Report (Administrative Appeals)").

96 *Ibid.*, at 16.

97 *Ibid.*, at 24.

98 1975, No. 91.

99 South Australia Report (Administrative Appeals), *supra*, note 95, at 24.

100 *Ibid.*

impose severe limitations so that Government and private business will not be seriously disrupted.

The Commission also recommended that "there should be a right of approach to the Courts wider and more flexible than the present prerogative writ procedures . . .".[101] It noted with approval the following provision in the Commonwealth's *Administrative Decisions (Judicial Review) Act 1977*:[102]

> 3.—(4) In this Act—
>
> (a) a reference to a person aggrieved by a decision includes a reference—
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> (i) to a person whose interests are adversely affected by the decision; or
>
> (ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation;
>
> and
>
> (b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.

## 4. ENGLAND

### (a) Introduction

The Law Commission addressed the law of standing tangentially in its 1976 *Report on Remedies in Administrative Law*.[103] It noted that the law of standing "has been developing to meet new situations" with respect to requests for a prerogative remedy (*certiorari*, prohibition and mandamus), a declaration or an injunction.[104]

### (b) Recommendations

The English Commission noted that "[t]he predominant view expressed in the consultation on our Working Paper No. 40[105] was that any attempt to define in precise terms the nature of the standing required would run the risk of

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101 *Ibid.*, at 16. See, also, *ibid.*, at 49.

102 *Supra*, note 69.

103 England, The Law Commission, *Report on Remedies in Administrative Law*, Law Com. No. 73 (Cmnd. 6407, 1976) (hereinafter referred to as "English Report").

104 *Ibid.*, para. 48, at 21.

105 *Remedies in Administrative Law* (1971).

imposing an undesirable rigidity in this respect".[106] It was of the view that "what is needed is a formula which allows for further development of the requirement of standing by the courts having regard to the relief which is sought".[107] Therefore, it recommended that the requisite standing for judicial review applications should be "such interest as the Court considers sufficient in the matter to which the application relates".[108]

The Commission did not provide any further elaboration of the rationale for the recommendation; nor did it indicate its view as to what was embraced by the term "sufficient interest". Nevertheless, in 1977,[109] the recommendation was incorporated into the English Rules of the Supreme Court, which now read as follows:[110]

> 3.—(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.
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> • • • •
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> (7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

This rule envisages a two stage process in a request for judicial review. First, an *ex parte* application is made to obtain leave of the court. It has been stated that "[t]he purpose of the requirement of leave is to eliminate frivolous, vexatious or hopeless applications for judicial review without the need for a substantive *inter partes* judicial review hearing".[111] After leave is granted, the court will then proceed to hear the substantive application for judicial review.[112]

One authority has commented on the interpretation of "sufficient interest" in rule 3(7), as follows:[113]

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106 English Report, *supra*, note 103, para. 48, at 21-22.

107 *Ibid.*, para. 48, at 22.

108 *Ibid.* The Commission's Draft Bill (*ibid.*, at 32) reads as follows:

> 1.—(3) The court shall not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

In an explanatory note, the Commission indicated that the provision already applied to applications for one of the three prerogative remedies, and that it was now being extended to declarations and injunctions in the context of judicial review (*ibid.*, at 33).

109 Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977/1955, s. 5, promulgating r. 3(1) and (5).

110 R.S.C. 1965, Ord. 53, r. 3(1) and (7).

111 Jacob *et al.* (eds.), *The Supreme Court Practice 1988* (1987), Vol. 1, at 795. See, also, *ibid.*, at 802.

112 *Ibid.*

113 *Ibid.*, at 803-04.

If the applicant has a direct personal interest in the relief which he is seeking, he will very likely be considered as having a sufficient interest in the matter to which the application relates. If, however, his interest in the matter is not direct or personal, but is a general or public interest, it will be for the Court to determine whether he has the requisite standing to apply for judicial relief. Clearly, the formula 'sufficient interest' is not intended to create a class of person, popularly referred to as a 'private attorney-general,' who seeks to champion public interests, in which he is not himself directly or personally concerned, under the guise of applying for judicial review.

The question of what is a 'sufficient interest in the matter to which the application relates' appears to be a mixed question of fact and law; a question of fact and degree and the relationship between the applicant and the matter to which the application relates, having regard to all the circumstances of the case; (cited with approval by Lord Roskill in *R. v. Inland Revenue Commissioners, ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, p. 659; [1981] 2 All E.R. 93, p. 107). The term 'interest' should perhaps not be given a narrow construction, but should be regarded as including any connection, association or interrelation between the applicant and the matter to which the application relates.

It should also be remembered that the requirement to establish a 'sufficient interest' must be shown at the stage of the *ex parte* applicant [*sic*: application] for leave to apply for judicial review. At this stage, the only question before the Court is whether a sufficient interest has been shown to justify granting leave. Except in simple cases where it is appropriate at the earliest stage to find that the applicant for judicial review has no interest at all or no sufficient interest to support his application, it is undesirable that the Court should delve into the question of whether the applicant has a sufficient interest or *locus standi* as a preliminary issue, since the question of sufficient interest must be taken together with the legal and factual context of the application and whether there has been a breach or failure to carry out statutory or public duties (*R. v. Commissioners of Inland Revenue, ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617; [1981] 2 All E.R. 93, H.L.). If leave is granted, neither the Court itself nor the opposite party will be precluded from considering afresh or contending as the case may be, that the applicant has no sufficient interest to maintain his substantive application for judicial review . . . . In other words, if leave is granted this will not act as a fetter on the Court's power to grant or refuse the substantial [*sic*: substantive] relief sought in the application for judicial review.

## 5. NEW ZEALAND

### (a) Introduction

Like the English Law Commission, the New Zealand Public and Administrative Law Reform Committee examined standing in the context of administrative law.[114] In fact, the New Zealand Committee drew on the recommendations of the

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114 New Zealand, Public and Administrative Law Reform Committee, *Standing in Administrative Law*, Report No. 11 (1978) (hereinafter referred to as "New Zealand Report"). The recommendations of the Committee applied to all forms of relief in the context of administrative law, except for damages.

English Commission,[115] although it should be noted that there was a minority view.[116]

In a section of the report entitled "The Competing Interests", the Committee indicated that "[s]tanding can be seen from two points of view", as follows:[117]

> One view, which we believe has diminishing support, emphasizes the injury to the plaintiff's rights . . . . The other takes a wider view and stresses the alleged wrongdoing of the defendant administrator . . . .

It noted, however, that "[t]he courts have in general not insisted on the plaintiff showing an invasion of his private legal rights . . . nor have they in general focused solely on the illegal actions of the defendant".[118] Instead, courts have focused on other factors, notably the prospect of increased litigation. But the Committee listed five reasons why the potential of opening the "floodgates" has been discounted as an argument against liberalized standing:[119] there is no evidence that a less restrictive approach to standing would, in fact, increase litigation; it would be improper for courts to be influenced by the prospect of a significant increase in their caseloads; it is unlikely that the uncertain state of the present law would deter a determined plaintiff; the courts already have "extensive powers to control and discourage unmeritorious proceedings";[120] and, finally, the floodgates argument is usually less germane to judicial review (where the relief sought "will usually be sufficient to put an end to the matter") than to actions for damages ("to which many of the 'floodgates' *dicta* relate").[121]

The Committee recognized that some standing restrictions can perform certain useful functions:[122]

> The standing requirements might ensure . . . that matters are brought before the Court only by those parties who are able and who have an incentive to present the case from a background of knowledge and interest. They might ensure secondly that those most affected will, as the parties, be bound by the judgment given. We agree that often when one party is more affected than others only he should be

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[115] *Ibid.*, paras. 2-3, at 1. On the English Commission, see *supra*, this Appendix, sec. 4(b).

[116] See *infra*, this Appendix, sec. 5(d).

[117] New Zealand Report, *supra*, note 114, para. 7, at 4.

[118] *Ibid.*, para. 8, at 4.

[119] *Ibid.*, paras. 10-11, at 5-6. See, also, *ibid.*, para. 49, at 28.

[120] *Ibid.*, para. 11, at 5. See, generally, *ibid.*, paras. 42-46, at 25-27 for a discussion of these powers.

[121] *Ibid.*, para. 11, at 6.

[122] *Ibid.*, para. 14, at 7.

> entitled to obtain relief in legal proceedings. Such indeed seems in general to be the case . . . . But this has been done without having an inflexible standing rule applied at the outset . . . .

Thus, the Committee pointed to instances where courts, in their discretion, have "refused to entertain an application because of the incompleteness of the factual background", "refused to grant a discretionary remedy to a stranger" after ruling on the merits, "made a choice between declaratory and coercive relief", and "adjourned proceedings or delayed the effectiveness of their orders".[123]

The Committee was concerned about those cases "where no single person is specially affected by the action in question".[124] It was of the view that, in general, "the defendant public authority should not be able to argue, as it may now do with some chance of success, that because its allegedly illegal action equally affects the *whole* population (rather than a small part of it), it should be immune from judicial review sought by any member of it".[125]

The Committee was also concerned about the determination of standing in the context of judicial review in a second special situation, namely, where there was no specified statutory procedure for participating in administrative proceedings. It was of the view that general legislation on standing would be "most significant" for such persons in these circumstances, as opposed to persons whose standing "will be resolved without difficulty by resort to, and interpretation of, the statutory provisions regulating participation in the administrative procedure".[126] The Committee stated that, "if the law provides an effective remedy, that remedy should, in general, be preferred to an action brought by a plaintiff representing the public interest".[127] It conceded that the alternative remedy will not always be "as effective as review by the courts".[128]

Finally, the Committee stated that it was not impressed with the argument that strict standing requirements can help "to ensure that the courts do not go beyond their proper role", since, it said, "[t]he principal constraints bearing on the proper role of the court are found in the limits of the substantive law of review which effectively confined the court to matters of law".[129] It noted that the court's discretion to refuse relief might also be relevant to that role.[130]

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123 *Ibid.*

124 *Ibid.*, para. 15, at 8.

125 *Ibid.* (emphasis in original).

126 *Ibid.*, para. 16, at 9.

127 *Ibid.*, para. 17, at 9.

128 *Ibid.*

129 *Ibid.*, para. 18, at 9-10.

130 *Ibid.*, para. 18, at 10.

### (b) Conclusions Respecting the Present Law

The Committee then examined the common law respecting challenges to administrative action in the context of the traditional remedies, and the ability of particular groups of plaintiffs to seek judicial review. It said that the following "general conclusions about the current state of the law" could be made:[131]

(i) Standing requirements are being liberalised.

(ii) The courts will not always insist on the plaintiff showing that he was specially affected in a way distinguishing him from many others subject to the action impugned.

(iii) That test will probably not have to be met in cases in which there is no other effective method of testing the legality of the action.

(iv) When the standing issues are discussed in more than a cursory way, the emphasis is likely to be on the broad context of the action or on the court's discretion rather than on a narrow range of technical issues. This may mean that the standing question is considered along with other issues and that it is not isolated and dealt with as a purely preliminary matter. If that is so, then the standing rules will not preclude at least some argument on the merits of the case.

(v) Many, but not all, recent cases draw no distinction between the standing requirement for the different remedies.

However, the Committee then cautioned that these conclusions can be stated with more confidence for England and Canada than for New Zealand.[132] In New Zealand, the courts "have tended to be more restrictive on standing, and the discussion is often brief, sometimes affected by the remedy sought, and sometimes of a narrow and preliminary character".[133] But it observed that there was "no binding decision" preventing New Zealand courts from moving in the direction of the English decisions and that "[w]e commend and support such a development".[134]

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131 *Ibid.*, para. 31, at 18-19.

132 *Ibid.*, para. 32, at 19.

133 *Ibid.*

134 *Ibid.* It should be noted that the Committee disagreed "with some of the broader statements made by members of the House of Lords" in *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435, [1977] 3 All E.R. 70 (H.L.), particularly the statement by Lord Wilberforce that "in general no private person has the right of representing the public in the assertion of public rights" (New Zealand Report, *supra*, note 114, para. 33, at 19). The Committee, however, was cognizant of the special features of the case, and that "[a]ll or even most of these features will only rarely be present when an action is being brought against a government agency alleging administrative illegality" (*ibid.*, para. 33, at 20).

The Committee also examined decisions interpreting the standing provisions under the *Declaratory Judgments Act 1908*,[135] the *Bylaws Act 1910*,[136] and the *Charitable Trusts Act 1957*,[137] and concluded as follows:[138]

> The legislature has traditionally adopted a policy of permitting broad access to the courts to challenge official action. The courts, we have noted, are moving in the same direction. We consider that the policy is, in general, the correct one. We consider that properly framed legislation could help effectuate that policy.

### (c) Recommendations

The New Zealand Committee premised its recommendations on the view that courts and Legislatures were already liberalizing the law of standing with respect to judicial review, and that existing legislation should be extended, much along the lines proposed by the English Law Commission.[139] Such a model, it said, would tend to produce a law that would be "more satisfactory technically" and would "achieve a better balance between the competing interests we have already outlined".[140]

Specifically, the Committee recommended that the *Judicature Act 1908*[141] be amended by adding the following provision:[142]

> 56D.—(1) On an application for review under Part I of the Judicature Amendment Act 1972, or for a writ or order of or in the nature of mandamus, prohibition, or certiorari, or for a declaration or injunction, the Supreme Court, in exercising its discretion to grant or refuse relief, may refuse relief to the applicant if in the Court's opinion he does not have a sufficient interest in the matter to which the application relates.
>
> (2) *Subsection (1)* of this section shall have effect in place of the rules of law and of practice relating to standing in respect of any such application.
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> (3) This section shall not limit the provisions of any other enactment under which the Court may grant relief in any proceedings.[143]

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135 1908, No. 220, s. 3.

136 1910, No. 28, s. 12.

137 1957, No. 18, s. 60.

138 New Zealand Report, *supra*, note 114, para. 41, at 24.

139 *Ibid.*, paras. 2-3, at 1. See, also, *ibid.*, para. 47, at 28.

140 *Ibid.*, para. 48, at 28.

141 1908, No. 89.

142 New Zealand Report, *supra*, note 114, Draft Bill.

143 Compare the recommendation of the English Law Commission, which recommended that a court should not grant relief unless the applicant had a "sufficient interest". The different wording in the draft legislation proposed by the New Zealand Committee was designed to "make it clear that in general the question of standing is not one to be dealt with as a purely preliminary matter, but is to be considered along with other issues in the context of the

The Committee was of the view that the amendment would codify the recent liberal decisions on standing.[144] It was also of the view that the amendment would create a single test for standing, regardless of whether the application was for a review under the *Judicature Amendment Act 1972*,[145] or for one of the older remedies (certiorari, prohibition, mandamus, injunction or declaration).[146] The Committee expressed "confidence in the judiciary and the exercise by them of a discretion which will discourage the meddler or busybody from becoming involved in proceedings in which he has insufficient interest".[147]

### (d) The View of the Minority

Two of the nine members of the Committee did not accept the model recommended by the English Law Commission and endorsed by the other members of the New Zealand Committee. They did not disagree with all of the majority's analysis of the need for reform. Indeed, they indicated—as did the majority—that they were not of the view that liberalizing the law of standing would open the floodgates. However, they had different concerns, which led them to make different recommendations.[148]

The minority members of the Committee stated that a "significant number of applications for judicial review seem to be brought . . . in order to secure the advantages of delay, without any real desire that the question or questions formally put in issue by the pleadings be resolved by the court".[149] They were concerned that the numbers of such abuses of process would increase if any person with a "sufficient interest" were allowed the right to challenge administrative action.[150]

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court's general discretion . . .". The test was framed in permissive terms because "the liberalising thrust of the proposal might be endangered by a mandatory, negative formula". This approach "emphasizes the discretion conferred on the court". See *ibid.*, para. 52, at 29-30.

144 *Ibid.*, para. 47, at 28. See, also, *ibid.*, para. 2, at 1. It noted that, as a result of recent decisions, "members of the public who are adversely affected are entitled to seek the assistance of the courts in securing obedience to the law and are seen as having a sufficient interest to maintain proceedings in these and other cases" (*ibid.*, para. 4, at 2). The Committee also noted that the amendment "is consistent with and in fact accepts the outcome of the recent cases where individuals have brought proceedings in the public interest" (*ibid.*, para. 5, at 2).

145 1972, No. 130.

146 New Zealand Report, *supra*, note 114, para. 2, at 1. See, also, para. 53, at 30. The Committee observed that the purpose of the amendment was "to strip away unnecessary restrictions on standing, to remove technicalities, and to modernise the law" (*ibid.*, para. 5, at 2).

147 *Ibid.*, para. 4, at 1-2.

148 *Ibid.*, minority report, para. 1, at 35.

149 *Ibid.*, minority report, para. 2, at 35. There was, however, no indication of any evidentiary basis for this view.

150 *Ibid.*

The minority agreed with the majority that the present law of standing was "unclear and uncertain", but it was of the view that the proposal of the majority would increase, rather than reduce, this uncertainty.[151] It expressed several concerns in this regard. First, "[t]he majority proposal will inevitably mean that much will depend upon the judge before whom a particular case comes".[152] Second, it stated as follows:[153]

> No guidelines or criteria are offered [by the majority] as to what is to be 'sufficient'. The future development of the law of standing would become unpredictable, especially since it would be problematic whether it would assume a definite shape at an early date; whether it would involve recourse to previous case law to ascertain what interests had hitherto been recognized as sufficient at common law; and whether arguments over standing would involve a new set of ingenious distinctions between cases. The greater the scope for argument over standing, the more complications attend the trial of the proceedings on their merits.

Third, the minority members were of the view that the proposal of the English Law Commission could not easily be grafted onto New Zealand's system of judicial review. And, finally, the minority stated as follows:[154]

> [T]he English formula makes no distinction between applications for review commenced by an individual in the interests of the public as a whole or a section thereof, on the one hand, and applications for review commenced by an individual who represents only himself, or himself and one or two others, on the other.

The minority also indicated that it had a second general concern, namely, that under the majority proposal some individuals or groups that deserved standing would not necessarily be granted it. For example, an environmental group "with no property of its own to be affected by some development, but representing some hundreds of concerned citizens, will not necessarily qualify, because no one member has any greater material interest than any other".[155] The minority, then, was concerned that "sufficient interest" might be equated with a traditional legal interest.

The minority responded to these two general concerns by recommending a scheme whereby, as under existing law, an applicant would have to ask the Attorney General, "in his role as traditional guardian of the public interest", for his consent to sue.[156] If, however, consent were denied, the minority recommended that the applicant should be entitled to request a "standing order" from

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151 *Ibid.*, minority report, para. 3, at 36.

152 *Ibid.*

153 *Ibid.*, minority report, para. 5, at 36.

154 *Ibid.*, minority report, para. 5, at 37.

155 *Ibid.*, minority report, para. 6, at 37.

156 *Ibid.*, minority report, para. 7, at 37. However, the minority did not elaborate on the need for this recommendation, especially in view of the one that followed.

the court.[157] The court would be required to grant the order if it were satisfied as follows:[158]

> a) that the person claiming to represent the public interest genuinely represents the interests of the public or a significant section of the public; and
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> b) that the public or, as the case may be, that section of the public, has or may reasonably consider that it has, a cause of complaint in relation to the exercise, refusal to exercise, or proposed or purported exercise of the statutory power in question (whether or not relief under this Act is likely to be granted); and
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> c) that in all the circumstances, having regard to the nature of the statutory power in question, and the number of persons who are or may be affected thereby, it is appropriate that the person claiming to represent the public interest should be permitted to commence an application for review. . . .

Furthermore, while the majority envisioned that standing would be determined along with the merits, the minority went to the other extreme by recommending that it should be resolved "at a preliminary stage, before the expense of preparing for trial is embarked on".[159] The minority also stated that there was a need for provisions "to avoid multiple applications for review in relation to the exercise of the same 'statutory power'".[160]

The minority appears to have envisaged a bifurcated type of standing regime. It stated that its proposal "would benefit only those claiming to represent the public interest",[161] and that those "who are specifically affected by a decision will continue to be able to commence an application for review without being obliged to seek a standing order".[162] It noted that "[b]orderline cases would undoubtedly arise as to how many must be affected before a 'significant section' is affected", and that the courts would have to resolve them when an application for a standing order was made.[163]

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157 *Ibid.* The minority did not turn its mind to the question whether the proposal requiring an applicant to request a "standing order" (instead of leaving it to the defendant to attack the plaintiff's standing) would complicate and lengthen litigation.

158 *Ibid.*, minority report, para. 7, at 38.

159 *Ibid.*

160 *Ibid.*

161 *Ibid.*, minority report, para. 8, at 39. It conceded that organizations would find it easier than individuals to convince a court that they represented the public, or a section thereof (*ibid.*, minority report, para. 10, at 40).

162 *Ibid.*, minority report, para. 8, at 39.

163 *Ibid.*

Finally, the minority saw no need to deny public interest applicants the right to seek the remedies available under the *Judicature Amendment Act 1972*,[164] or the right to seek an interim order preserving the *status quo*.[165]

However, in response to the recommendations of the minority members of the Committee, the majority was of the view that the proposal to include the Attorney General in the "screening process" would be "cumbersome, confusing and timeconsuming for the litigants", and "it might deprive some litigants of the direct access to the Courts they now enjoy and in other cases involve them in unacceptable delays".[166]

## 6. IRELAND

Ireland's Law Reform Commission examined standing in the context of a 1979 Working Paper on judicial review.[167] It found that at present there were conflicting interpretations of standing criteria, and different criteria for different remedies.[168]

The Commission also noted that *Gouriet v. Union of Post Office Workers*[169] had reaffirmed that the Attorney General—"a political figure"—had an exclusive right to represent the public interest. However, the Commission sought to distance itself from the decision, although primarily by noting that, by seldom being a member of the Legislature, the Attorney General cannot be effectively challenged there.[170]

The Commission stated that it was still uncertain whether "a wider concept of the individual citizen's right of access to the courts in [*sic*: is] now emerging in Irish law".[171] It also noted that in other common law jurisdictions, notably Canada and the United States, "there is a tendency towards a wider notion of the interest necessary to support an application for an injunction or a declaration".[172] It also noted that the Oireachtas (the Irish Parliament) had

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[164] *Supra*, note 145, s. 4.

[165] New Zealand Report, *supra*, note 114, minority report, para. 14, at 40-41.

[166] *Ibid.*, para. 3, at 1.

[167] Ireland, The Law Reform Commission, *Judicial Review of Administrative Action: The Problem of Remedies*, Working Paper No. 8 (1979) (hereinafter referred to as "Irish Working Paper").

[168] See, generally, *ibid.*, paras. 2.18-2.22, at 20-25, paras. 2.31-2.34, at 34-36, para. 3.15, at 44-45, and paras. 3.24-3.26, at 50-53.

[169] *Supra*, note 134.

[170] Irish Working Paper, *supra*, note 167, para. 3.27, at 53-54.

[171] *Ibid.*, para. 3.28, at 54.

[172] *Ibid.*, para. 3.30, at 55.

inserted a broad standing right in recent environmental protection legislation. In view of these developments, the Commission was of the view that it was possible that the courts might adopt a more liberal attitude, especially where constitutional rights were at stake.[173]

It dismissed the concern that allowing individuals to litigate questions affecting the public would result in a multiplicity of proceedings. As proof of this, it pointed to the experience in Canada and Michigan.[174] It stated that "it has been accepted since 1894 that a ratepayer has locus standi to challenge decisions of the local government auditor" and this has not resulted in "a spate of unmeritorious or vexatious applications".[175] Moreover, it also noted that "the Oireachtas has shown in its recent legislation on planning and water pollution that it is not impressed by the 'floodgates' argument".[176]

The Commission's general recommendation was that there was a need for a uniform procedure, similar to that already in place in Ontario by virtue of the *Judicial Review Procedure Act, 1971*,[177] for seeking judicial review. In this context, the Commission recommended that the proposed legislation "*should empower the Court to dismiss an application for review if satisfied that the plaintiff has no real concern with the subject matter*".[178] The Commission conceded that "this [recommendation] would leave untouched the present locus standi requirements of each individual remedy".[179] However, it was of the view that "when the new procedure becomes widely known, applications for the individual remedies would cease to be made and would be replaced by the comprehensive application for review".[180] This process would be accelerated if there were "[a] uniform and broad requirement of locus standi" for the proposed review procedure.[181]

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173 *Ibid.*, para. 3.32, at 56.

174 *Ibid.*, para. 3.34, at 57.

175 *Ibid.*, para. 3.35, at 58.

176 *Ibid.*

177 S.O. 1971, c. 48. See, now, *Judicial Review Procedure Act*, R.S.O. 1980, c. 224.

178 Irish Working Paper, *supra*, note 167, para. 6.7, at 80 (emphasis in original). See, also, *ibid.*, Draft Bill, s. 5. In this regard, the Commission pointed to the advantages of the "real concern" formula espoused by the Australian Working Paper, *supra*, note 24. Such a formula would "widen locus standi", and would also give the courts more flexibility, especially "where important public questions were involved . . .". (Irish Working Paper, *supra*, note 167, para. 3.36, at 58).

179 *Ibid.*, para. 6.7, at 80.

180 *Ibid.*

181 *Ibid.*